A

THOMISTIC INTERPRETATION

OF

CIVIC RIGHT

IN

THE UNITED STATES

To Tom.

In appreciation of services rendered

By

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INTRODUCTION

This book was first conceived some twelve years ago. At the time, a friend was writing on *Civic Duty.*[1] We reasoned that if a citizen has duties, he has rights also. Why not, then, have a work on *Civic Right? Civic Right,* however, while intended as a complement to *Civic Duty,* differs radically from it.

But the real reason for undertaking the present study is the earnest conviction, that such a study is needed. In fact, it should have been undertaken long ago. As far back as 1925, the belligerent Senator William Borah declared[2] as the issue of the day (an issue which is all the more pronounced today) the dissolution of "Paternalistic Bureaucracy"[3] and the recovery of the people's rights. Fortunately, the more discerning Americans have always vigorously worked for that. In the vanguard of such exponents of civic rights, must be placed the alert periodical, *America,* which has at all times valiantly and effectively espoused the interests of the people. Excellent as *America's* program has been and still is, it has been concentrated principally on imminent, specific dangers as they arose. What is sorely needed, is a general, integrated work on civic right, treated *ex professo* and explaining its scope, its moral and its legal foundations as well as its specific problems. In this sense the writer takes the words of David Goldstein when he says: "...there is need of furthering the work that *America* is doing to educate our populace as to the basic rights of the family and the civil rights by which it is kept intact."[4]

It is this work, then, that *Civic Right* modestly hopes to further. Our viewpoint and treatment, however, will be different. The subject will be considered in its entirety though not apart

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1. Goetz, J. A., *Civic Duty* (unpublished).

2. Cf. *New York Times, The,* New York, April 5, 1925, 1:3; also *America,* New York, 33::1 (April 18, 1925), p.l.

3. Cf., e.g., Beck, J. M., *Our Wonderland of Bureaucracy* (A Study of the growth of Bureaucracy in the Federal Government, and its Destructive Effect upon the Constitution), New York, 1932.

4. In a letter to the Editor of *America,* 32::19 (Feb. 21, 1925), p. 445.

from certain specific, present exigencies; the treatment, moreover, will be scientific, as well as practical. In Chapters One and Two, preliminary ideas relative to RIGHT and to CIVIC Right will be expounded. Chapters Three, Four, Five, Six and Seven will consider the various civic rights, explicitly guaranteed in the *Constitution of the United States of America,* namely, Religious Liberty, Free Speech, Freedom from Search, Judicial Rights and Electoral Rights. The treatment of each of these rights will be along the same general lines; each right in turn will be considered, its definition and its extension, its moral and its legal foundations, and, finally, any special problems that arise in its connection. As a complement to the whole work, Chapter Eight will take up the study of "Implied Rights", "Equal Rights" and "The Protection of One's Rights". Such is the general outline, that the writer sets for himself at the inception of this work.

Since this is a theological dissertation, theistic, moral norms will be ultimate norms. The subject matter, however, bears on rights explicitly guaranteed in the Constitution, and, therefore, certain legal reflections also will have to be made. But here again the law of the land will have to be evaluated in terms of the law of God. Hence, two kinds of sources must be explored: legal as well as moral.

While there are many moral sources, that might be profitably examined, there is none richer than the works of St. Thomas. In fact, it is the author's contention, that the remedy for all the present ills of government can be found there. In this regard, the illustrious Leo XIII declared: "Domestica vero, atque civilis ipsa societas, quae ob perversarum opinionum pestem quanto in discrimine versetur, universi perspicimus, profecto pacatior multo et securior consisteret, si in Academiis et scholis sanior traderetur, et magisterio Ecclesiae conformior doctrina, qualem Thomae Acquinatis volumina complectuntur.[5] Quae enim de germana ratione libertatis, hoc tempore in licentiam abeuntis, de divina cujuslibet auctoritatis origine, de legibus earumque vi, de paterno et neque summorum Principum imperio, de obtemperatione

5. Mgr. Dr. Nolens of Holland during his long parliamentary career repeatedly cited in Congress the opinions of St. Thomas.

sublimioribus potestatibus, de mutua inter omnes caritate; quae scilicet de his rebus et aliis generis ejusdem a Thoma disputantur, maximum atque invictum robur habent ad evertenda ea juris novi principia, quae pacato rerum ordini et publicae saluti periculosa esse dignoscuntur.''[6] It is, then, in conformity with the Church's own wish, that the writer has recourse to St. Thomas, though he neither minimizes nor altogether discards the legacy of others.

Our two principal legal sources, on the other hand, will be *The Declaration of Independence* and the *Constitution of the United States of America.* In them is to be found the chief guarantee of all civic rights. *The Declaration of Independence,* while not properly constituting a part of the law of the land, nevertheless must serve as the ultimate source for legal contentions in this regard. And why?,—for the simple reason that the principles, on which separation from the Mother Country is declared or justified, must, logically, be the principles, on which the new governmental venture is founded. It is in *The Declaration of Independence,* therefore, that the American people must look for the ultimate quasi-legal guarantee of their rights.

Nor is *The Declaration of Independence* a mere State document. It is more, it is an embodiment of the truly Medieval and Christian norms of all just government. To any one ever so superficially examining the document and its sources, it becomes apparent that in no way does *The Declaration of Independence* contain anything essentially new. Thomas Jefferson himself, who drew up this grand document, unequivocally acknowledged this,[7] for he fully realized that he was but reiterating a Whig Doctrine, developed from St. Thomas and more immediately from

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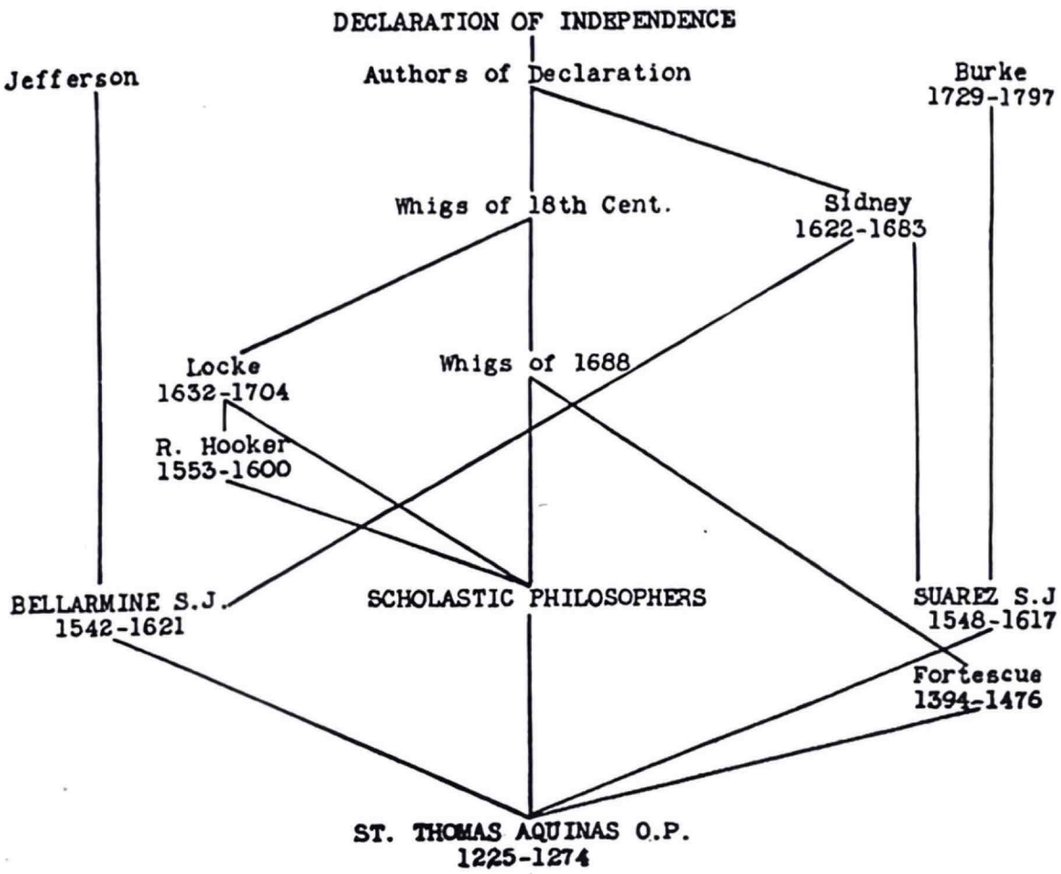
6. Leo XIII, ''Aeterni Patris'' (Cf. Bibliography).

7. Thomas Jefferson wrote: ''This was the object of the Declaration of Independence. Not to find out new principles, or new arguments, never before thought of, not merely to say things which had never been said before....Neither aiming at originality of principle or sentiment, nor yet copied from any particular and previous writing, it was intended to be an expression of the American mind....'' (To Henry Lee, May, 8, 1825. *The Writings of Thomas Jefferson,* 20 Vols., Library Edition, Andrew A. Lipscomb, Editor-in-chief, Washington, 1903, Vol. XVI, p. 118).

St. Bellarmine and Blessed Suarez. To prove this here, however, is not necessary; the reader is referred to more ample sources[8]

8. We reproduce here a scheme set forth by Francis Le Buffe, S.J., in his *Outlines of Pure Jurisprudence,* New York, 1924, p. 150:



In explanation thereof, cf., e.g.:—

Ryan, J. A. and Millar, M. F. X., *The State and the Church,* New York, 1924, pp. 99-195.—O'Rahilly, Alfred, two series of articles on "Democracy" and "The Sovereignty of the People", *Studies,* Dublin, 6::24 (Dec. 1917), 7::25 (March 1918), 8::29 (March 1919), 9::33 (March 1920), 10::37 (March 1921), 10::38 (June 1921).—Hunt, Gaillard, "Virginia Declaration of Rights and Cardinal Bellarmine", *The Catholic Historical Review,* Washington, 3::3 (October 1917), pp. 276-289.—Reuss, Basil, "Changing the Constitution", *The Ecclesiastical Review,* Philadelphia, 94::2 (February 1936), pp. 165-173.—*America,* 20::12 (Dec. 28, 1918), pp. 285 ff.; 20::16 (Jan. 25, 1919), pp. 386 ff.; 22::19 (Feb. 28, 1920), pp. 413 ff.; 23::18 (Aug. 21, 1920), pp. 416 ff.; 23::19 (Aug. 28, 1920), pp. 437 ff.; 23::20 (Sept. 4, 1920), pp. 463 ff.; 25::6 (May 28, 1921), pp. 125 ff.; 25::8 (June 11, 1921), pp. 175 ff.; 36::14 (Jan. 15, 1927), pp. 324 ff.; 37::12 (July 2, 1927), pp. 269, 272 ff.; 37::15 (July 23, 1927), pp. 344 ff.; 38::3 (Oct. 29, 1927), pp. 53 ff.—Lugan, Alphonse, *L'Enseignement social de Jesus,* Paris, 1908.

and to the writer's own Thomistic parallel proposed in Chapter Two.[9] It should be remarked, however, that a return to this philosophy of *The Declaration of Independence* is all the more imperative today, as a radical departure from it characterizes the philosophy of many of our secular colleges and universities.[10]

The Declaration of Independence, however basic and sublime it may be, has no legal force. Constitutions and laws have. Hence, if rights are to be safe,[11] some constitutional or legal provision must be made for them. In this regard the Church is very explicit, for it ordains that "Jura quidem, in quocumque sint, sancte servanda sunt; atque ut suum singuli teneant, debet potestas publica providere, propulsandis atque ulciscendis injuriis."[12] The *Constitution of the United States of America* is hardly less explicit, as any cursory perusal thereof discloses. In fact, without such a constitutional provision, the rights of minorities would constantly be at the mercy of intriguing majorities. To the Constitution, then, one must have recourse for the legal guarantee of his rights. Nevertheless, it may be asked, especially in view of the once "omnipotent" 18th Amendment, whether in point of fact the American Constitution effectively protects one's basic rights. The author believes that it does, at least theoretically. The Constitution, as subsequent chapters will reveal, contains an explicit or at least an implicit guarantee of all man's rights; moreover, the Courts, (according to approved tradition) are made the custodians thereof, by virtue of their indirect power to pass on the constitutionality of all legislation. In conse-

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9. Cf. C. II, Art. III Civic Right in the United States, "St. Thomas and American Independence."

10. This is also the opinion of *America,* 33::12 (July 4, 1925), p. 280; 36::8 (Dec. 4, 1926), pp. 174 ff. Basil Reuss stresses the same point in "Changing the Constitution", *The Ecclesiastical Review,* 94::2 (February 1936), p. 172 and footnotes.

11. Cf.. e.g., Plato, *Laws,* Book ix (Jowett). Cf. Bibliography.—Aristotle, *Ethica Nicomachea,* Book x.9 (Ross). Cf. Biblography.—St. Thomas, *Summa Theologica,* I-II Q. XCV, Art. I (The Venice 1593 Edition is used throughout this dissertation, when reference is made to Thomas. Cf. Bibliography).

12. Leo XIII. "Rerum Novarum".

quence, no law, strictly so-called and inimicable to man's rights, can pass and have the force of law. Such theoretically is the American scheme of government; as long as the Constitution is faithfully interpreted and upheld, man's rights are safe.[13] From this it becomes apparent, that the whole question resolves itself down to the faithful interpretation of the American "Magna Charta", the federal Constitution. That the 18th Amendment should have been adopted and its enforcement legislation approved, but re-emphasizes the imprudence to leave to the Supreme Court or repeal what a vigilant electorate should never in the first place tolerate.[14] If the 18th Amendment was distorted beyond recognition, why could not the first ten be similarly distorted?[15] Without the faithful interpretation of the Constitution by an active and united electorate, the great "Bill of Rights" becomes a mere scrap of paper; whereas, faithfully interpreted, it stands as the greatest document for the safeguarding of human rights that ever existed.[16] The sad fact, however, is that so few have ever really read the Constitution; it is said[17] that, if lawyers be excepted, only one in every thousand has ever read this great document. It is the author's ardent hope, therefore, that this dissertation may be, incidentally, the means of disseminating knowledge of and respect for the Constitution, by demonstrating how the Constitution faithfully interpreted is the bulwark of all man's liberties.

While *The Declaration of Independence* and the *Constitution of the United States of America must* be examined for their bearing on this dissertation,—State Constitutions, laws and court decisions *may* be examined for subsidiary material and proof. However, to be exhaustive herein is entirely out of the question. When one handles the ponderous tomes of *The Public Statutes at*

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13. *America,* 32::20 (Feb. 28, 1925), pp. 478 ff.; 39::8 (June 8, 1928), p. 209.

14. *Ibid.,* 33::15 (July 25, 1925), p. 359.

15. *Ibid.*. 35::2 (April 24, 1926), p. 29.

16. *Ibid.,* 29::24 (Sept. 29, 1923), pp. 559-560, "Back to the Constitution" by Anthony J. Beck.

17. *Ibid.,* 25::25 (Oct. 8, 1921), p. 583.

Large of the United States of America, and then surveys the shelves on shelves of United States Supreme Court Decisions, finally to cast a tired glance at the sections on sections of State Laws and Court Reports,[18]—then he is not at all surprised to hear that eminent political figures such as Borah, Root, Beveridge[19] and others[20] should have declared that no one knows what the law prescribes or forbids because no one has ever read it, will read it or could read it. Hence, to pretend to be exhaustive herein, even in the least way, would be preposterous. In fact, only certain meagre portions thereof will be drawn on to illustrate and substantiate contentions, which otherwise are fully warranted and proved. Especially important in this regard will be the Supreme Court decisions, as they constitute, so to say, a living commentary on the Constitution and, therefore, furnish conclusive legal argument.

Such, then, are the moral and the legal sources, to which recourse is had in this dissertation. As remarked above, the moral must measure the legal. Although legal institutions in America as a whole admirably measure up to the law of God and of His Church, one must bear in mind that at all times they are and must be in obeisance to it. Any law, at variance with it, is not law, for the simple reason that all law strictly so-called has its origin in the eternal.[21] As an illustrious Civil War Statesman[22]

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18. For similar observations and statistics, cf., e.g., *America,* 15::17 (Aug. 5, 1916), pp. 411 ff.; 29::10 (June 23. 1923), pp. 230 ff.; 32::22 (March 14, 1925), p. 520; 36::20 (Feb. 26, 1927), p. 467.

19. In a speech, delivered in New York on Jan. 20 1925, Senator Beveridge declared: "No human being knows, or can know, what these innumerable laws mean. No human being knows how many statutes are hidden within the forbidding covers of the thousands of volumes that contain acts of Congress and of legislatures;.... How can anyone obey every law, when nobody knows, or can know, how many laws there are, or what they command or forbid?" (This and other quotations may be found in *America,* 32::17, p. 399 for Feb. 7, 1925).

20. E.g., Charles E. Hughes, formerly Associate Justice of the Supreme Court of the U. S. (Cf. *America,* 33::4, p. 88 for May 9, 1925).

21. St. Thomas, *Summa Theologica,* I-II Q. XCIII. Art. III.

22. William H. Seward of New York, U. S. Senator and later Secretary of State under President Lincoln.

once put it: all "laws must be brought to the standard of the laws of God, and must be tried by that standard, and must stand or fall by it".[23] In fact, it is exactly this that impels us to undertake the present study and to write this book,—namely, to find the justification of American legal institutions as to civic right in the law of God and of His Church, as so lucidly expounded by St. Thomas. Only in this way does one arrive at the real foundation of rights, and, incidentally, does he realize the admirably Thomistic and, therefore, Catholic conception of the entire governmental venture here in America.

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23. In his debate with Webster and Clay over the Compromise Bill of 1850. Related in A. B. Hart, *American History told by Contemporaries*, 5 Vols., London, 1897-1929, Vol. IV, p. 57.

CHAPTER I

RIGHT IN GENERAL

ARTICLE I — DEFINITION OF RIGHT

ETYMOLOGY OF "RIGHT"

There are comparatively few words that are used as commonly and as variously as the word "right". Thus, we say: "You're right! You should have made a right turn." ... "I'll be right down, as soon as I find the right coat." ... "Right conduct is treated in ethics; right angles in geometry." ... "According to Natural Right, I have a right to do that." ... etc., etc. Nevertheless, no matter in what sense the word "right" is used, it is traced back to the same original root. Etymologists[1] tell us that the word "right" is derived from the Anglo-Saxon "riht" and has such cognate forms as "regt" (Dutch), "réttr" (Icelandic), "ret" (Danish), "rät" (Swedish), "recht" (German), "reht" (Old High German), "raihts" (Moeso-Gothic) and "rectus" (Latin). "Rectus", in turn, comes from "regere", and is allied to the Greek "ὀρέγειν" (to stretch), the Gothic "uf-rakjan" (to stretch out) and the Sanscrit "rij" (to stretch) and "ráj" (to govern). Moreover, all these varied forms have the same root, "rag"[2] or "rak",[3] meaning "to stretch", "to stretch out", "to reach", "to make straight", "to rule".

This very simplicity of origin, however, may be cause for confusion. That is why St. Thomas repeatedly[4] warns us: "Aliud est etymologia nominis, et aliud est significatio nominis. Etymologia enim attenditur secundum id a quo imponitur nomen ad significandum; nominis vero significatio attenditur secundum id ad quod significandum nomen imponitur. Quae quandoque di-

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1. Skeat, W., *A Concise Etymological Dictionary of the English Language*, Oxford, 1897, pp. 396, 401, 593 (No. 293).

2. So-called "classical" or primitive Aryan form.

3. So-called "English" or primitive Teutonic form.

4. St. Thomas, e.g., *Summa Theologica*, I Q. XIII, Art. II ad 2; I Q. XXIX, Art. III ad 2 et 3; *Q. Disp. De Potentia*, Q. IX, Art. III ad 1; *In Ium Sent.*, Dist. 23, Art. II ad 1.

versa sunt''[5] He further states that although a term was originally limited to its etymological meaning, it is often gradually extended to kindred and perhaps somewhat different meanings.[6] This would imply that as interesting and perhaps clarifying as Etymology may be, it cannot be, in the final analysis, conclusive proof for the acceptation of a term. A word, after all, is what people make it to mean and no more. Hence, it is rightly ordained, no matter what be the science or the enquiry: ''Define your terms!''[7]

DEFINITION OF RIGHT IN GENERAL

In the present work, the term ''right'' is limited to its juridic meaning. Although so restricted, the term may mean: (1) LAW, as when we say, ''Natural Right obliges me to keep this secret''; or (2) JUST DUES, as in the expression, ''Every citizen is assured his rights''; or (3) THE MORAL FACULTY inherent in a subject to exact his just dues, as for example, ''I have a right to life, liberty and the pursuit of happiness.''

RIGHT AS LAW

Although we seldom now use the English word ''right'' in the sense of law, we do find it used in that sense in most every period of English Literature. In substantiation of that statement, we cite here a few examples, quoted by Murray in his encyclopedic work, entitled *A New English Dictionary on Historical Principles*:[8]

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5. St. Thomas. *Summa Theologica,* II-II Q. XCII, Art. I ad 2.

6. *Ibid.,* II-II Q. LVII, Art. I ad 1.

7. Amos, S., *The Science of Law,* New York, 1900, p. 88: ''The term right is the central term at once of the Science of Law and of the Science of Morality. A complete understanding of the term, as it is used in the exposition of each science carries with it a complete understanding of the nature of science itself.''—Cicero, *De Officiis,* L.I, ii: ''Omnis enim, quae (a) ratione suscipitur de aliqua re institutio, debet a definitione proficisci, ut intellegatur, quid sit id, de quo disputetur....'' (Cf. Bibliography).

8. Murray, Sir James A. H., *A New English Dictionary on Historical Principles,* 10 (11) Vols. and Supplement, Oxford, 1888-1933, Vol. VIII (1910), p. 669.

c. 900 *Baeda's Hist.* iv. v. (1890) 276 Licade us efencuman aefter theawe arwythra rehta (L. juxta morem canonum venerabilium)

c. 1000 Aelfric *Gloss.* in Wr.-Wuelcker 114 *Fas,* Godes riht. *Jus,* mennisc riht.

c. 1200 Ormin 7202 Herode king wass grill...whannse he seth thatt Godess rihht & Godess lashe riseth.

1483 Caxton *Gold. Leg.* 427-1 Ful of grete scyence in ryght cyuyl and in cannon.

1610 Willet *Dan.* 356 These doe not distinguish betweene the ceasing of the sacrifices in right and in fact.

Later and contemporary literature furnish further proof. The reader, however, is already familiar with that.

What is true, in this regard, of the English word "right", is true also of its cognate forms in the other principal modern languages. The German "Recht", the French "droit", the Italian "diritto" and the Spanish "derecho", all have "law" at least as secondary meaning. So, for instance, the German "Recht" is used in the sense of law in such expressions as "das buergerliche Recht" (civil law), "das gemeine Recht" (common law), "das Recht der Natur" (law of nature), "der Student der Rechte" (the law-student), etc. In French, "droit" has the same signification[9] in such expressions as "Le Droit Canon"[10] (Canon Law), "La Science du Droit" (The Science of Law), etc. What holds true for German and French, holds equally true for Italian; for example, the English "Canon Law" is rendered "il diritto canonico". In like manner, the Spanish "el derecho" is used in the sense of law; for example, "derecho canónico" (Canon Law), "derecho romano" (Roman Law), "derecho civil"

9. Brun, L., *Introduction à l'étude du droit,* Paris, 1887 (2nd edition), p. 31: "Il est peu de mots qui, à l'École, au Palais et dans le langage usuel, soient pris en autant d'acceptions et de sens différents que le mot droit." And on p. 32: "On prend quelquefois le mot droit comme synonyme de science du droit de jurisprudence."

10. Valensin, A., *Traité de Droit Naturel,* 2 Tomes, Paris, 1922-1925, Tome I, p. 181: "Quant aux lois ecclésiastiques, elles font l'objet d'une science spéciale appelée le Droit canon."

(Civil Law), etc.[11] It would be futile, indeed, to carry this discussion much further in the other existing languages, for, although the findings might be both interesting and substantiating, they would shed very little light on the term's acceptation in moral.

As a matter of fact, however, in the Science of Morality also, "right" is used in the sense of "law". Nevertheless, the two terms, law and right, are not interchangeable.[12] According to Thomas[13] and Suarez[14], among others, law is not strictly right, but rather the reason or the norm of right. Hence, no law can be called "right", except it concern the passive rights or "the just dues of another".

But why does St. Thomas contend that law is rather the reason of right, than right itself? It is simply, because all rights come from law and are grounded thereon.[15] "Law", according to Blackstone,[16] "in its most general and comprehensive sense, signifies a rule of action,...And it is that rule of action which is pre-

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11. Among other definitions of "derecho", the following is typically standard: "Colección de leyes y preceptos por que se rigen las sociedades. Aplícanse a la palabra en esta acepción multitud de calificativos para distinguir las variedades del derecho según países, grupos sociales, etc. Cf. *Diccionario manual enciclopédico ilustrado de la lengua castellana,* S. Calleja, Madrid, 1919, p. 518.

12. Pruemmer, D., *Manuale Theologiae Moralis,* 3 Vol., Friburgi Brisgoviae, 1923. Vol. II, p. 2, n. 1: "...tamen jus et lex non sunt prorsus idem."

13. St. Thomas, *Summa Theologica,* II-II Q. LVII, Art. I ad 2: "...lex non est ipsum jus, proprie loquendo, sed aliqualis ratio juris."

14. Suarez, F., (*Opera Omnia,* 28 Vol., Parisiis, 1856-1878), De Legibus, Lib. II, Cap. xvii n. 2: "Aliquando vero jus significat legem, quae est regula honeste operandi, et in rebus quamdam aequitatem constituit, et est ratio ipsius juris priori modo sumpti" (i.e., ut facultas moralis ad rem aliquam vel in re).

15. Zigliara, T. M., *Summa Philosophica,* 3 Vol., Parisiis, 1909, Vol. III, p. 125: "Quia autem nemo habet facultatem repentendi aliquid ut suum nisi ab aliqua lege sive naturali, sive positiva; hinc jus haud raro sumitur etiam pro lege, legum collectiones *jus* vocantur, quia revera *lex* mensura et regula juris."

16. Blackstone, W., *Commentaries on the Laws of England,* 2 Vols., Philadelphia, 1862, Vol. I, Introd., Sec. 2, p. 38—Cf. St. Thomas, *Summa Theologica,* I-II Q. XC, Art. I.

scribed by some superior, and which the inferior is bound to obey.'' From this arises the idea of obligation on the part of the subject, and when there is question of ''just dues to another'' not only of obligation but also more precisely of a duty or obligation of justice. Now, every duty of justice implies a corresponding right,[17] although this does not mean that ultimately duty is antecedent to right. God, the Prime Mover, is the supreme Lawgiver, antecedent to and independent of all duty; God's right to man's obedience is man's duty, and from man's duty originates man's right to the means to fulfill that duty; this right, in turn, implies a duty on the part of one's fellow-men to respect that right, and so on[18]—right and duty being correlative terms.

Now, it follows, that, when law regulates the ''just dues'' one owes to another (which is that other's right), it is really the ''aliqua ratio juris'' of St. Thomas. Law in this sense, so to say, determines rights, by obliging others to respect these rights according to a certain norm or rule, stating what is just or due.[19] Hence, Suarez,[20] Cathrein[21] and others very aptly call law ''jus praeceptivum'' to distinguish it from the moral faculty to exact one's just dues to which they give the name ''jus dominativum''.

RIGHT AS JUST DUES

This dissertation, however, is concerned not so much with ''jus praeceptivum'' as with ''jus dominativum''. Now, right or ''jus dominativum'' passively considered means ''just dues''. Actively considered, it refers to the ''moral power to exact these just dues''.

Just as the English word ''right'' has always been used in the sense of law, so it has always had this twofold other meaning.

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17. In the strict acceptation of the word and, therefore, not a mere ''claim''.

18. Cf. scheme in Le Buffe's *Outlines of Pure Jurisprudence,* pp. 74-75.

19. Pruemmer, D., *Manuale Theologiae Moralis,* Vol. II, p. 2.

20. Suarez, F., *De Legibus,* Lib. II, Cap. xiv n. 16 et Lib. II, Cap. xvii n. 2.

21. Cathrein, V., *Philosophia Moralis,* Friburgi Brisgoviae, 1935, p. 207 (no. 283).

Murray again furnishes apt examples; here are but a few:[22]

c. 970 in Thorpe *Laws* I. 258 Do thám theofe his riht, swa hit aer Eadmundes cwide waes.

c. 1200 *Trin. Coll. Hom.* 179 Unnethes hie winnen jiet here louerdes rihttes.

c. 1380 Wyclif *Sel. Wks.* III. 328...and cursed, for thei withdrawen rijttis of holy Chirche.

a. 1625 Fletcher *Nice Valour* V. iii, Honour and admiration are her rights.

1810 Scott *Lady of L.* III. xviii, Grief claim'd his right, and tears their course.

The German, French, Italian and Spanish have similar uses. In fact, "Recht", "Droit", "Diritto" and "Derecho" primarily mean "jus dominativum". "Law" or "jus praeceptivum" is only their secondary meaning.

If at times "right" is used in Moral Theology in the sense of law, still more properly and generally it is used to denote "just dues" or the "jus dominativum" of Suarez, passively considered. Suarez[23] says that right may signify a certain equity, which is due to another out of justice; and this, he maintains, is the commoner acceptation of the term. However, the renowned Jesuit theologian is here but reiterating the doctrine of St. Thomas; for, according to the Angelic Doctor,[24] that is just, which corresponds to a "certain equality to another", as for instance the recompense of wage due for service rendered. St. Thomas further states that a person may call that his own which is due him according to equality of proportion.[25]

Used in this sense, right is the proper object of justice.[26] If, then, we know what justice is, we know what "just dues" are. Now, justice (which is essentially concerned with others[27]) im-

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22. Murray, Sir James A. H., *A New English Dictionary on Historical Principles,* Vol. VIII, pp. 670-671.

23. Suarez, F., *De Legibus,* Lib. I, Cap. ii n. 4.

24. St. Thomas, *Summa Theologica,* II-II Q. LVII, Art. I c. et Art. II c.

25. *Ibid.,* II-II Q. LVIII, Art. XI c.

26. *Ibid.,* II-II Q. LVII, Art. I c.

27. *Ibid.,* II-II Q. LVIII, Art. II c.

plies strict equality ("aequalitatem rei ad rem") and imposes a strict obligation ("strictum debitum").[28] The virtues of religion, filial devotion and deference do not strictly pertain to justice, because, while they impose a strict obligation, they do not imply strict equality. In the case of these virtues there can never be "equality of thing to thing", either because of the Infinite Dignity of the Person due or the inestimableness of the debt incurred. Hence, God's right is called in Latin not "jus", but "fas", since man cannot render to God all that is His due.[29]

Then, again, there are other virtues, closely allied to justice, that do not impose a strict obligation. Now, this leads us to make a very important distinction, frequently insisted upon by St. Thomas,[30] namely, between "debitum legale" and "debitum morale". In the words of the Angelic Doctor himself, "debitum quidem legale est ad quod reddendum aliquis lege adstringitur", while "debitum morale est quod aliquis debet ex honestate virtutis".[31] The latter gives rise to such virtues as truthfulness, gratitude, severity, amiability and liberality—to which one's neighbor has no strict right and which, therefore, are not due him in full justice. Hence, St. Thomas concludes that strict justice concerns itself with those actions only which are ordered to another by reason of the "debitum legale".[32]

Since, therefore, right, as the proper subject of justice, implies not only equality but also a strict obligation, right in the sense of "jus dues" must be defined, as that which is due to another according to strict equality in virtue of an equally strict obligation—an obligation, which St. Thomas calls a "debitum legale", a legal due or "just dues".

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28. *Ibid.*, II-II Q. LXXX, Art. I c.

29. *Ibid.*, II-II Q. LVII, Art. I ad 3.

30. *Ibid.*, e.g., I-II Q. XCIX, Art. V; II-II Q. XXIII, Art. III ad 1: Q. LXXVIII, Art. II ad 2; Q. LXXX, Art. I; Q. CII, ad 2; Q. CVI, Art. I ad 2; Q. CVI Art. IV ad 1; Q. CXIV, Art. II; Q. CXVII, Art. V ad 1: Q. CXVIII, Art. III ad 2.

31. *Ibid.*, II-II Q. LXXX, Art. I c.

32. *Ibid.* II-II Q. XXIII, Art. III ad 1; Q. LXXX, Art. I c.

RIGHT AS A MORAL FACULTY

From the definition, just given, of "jus dominativum" passively considered to that of "jus dominativum" actively considered is but the natural and logical step. Nothing can be said to be due to another except in so far as another is looked upon as having the legitimate power or faculty of claiming that as his own.[33] Hence, right, strictly speaking, is a moral faculty[34] and as such may more fully be defined as a moral and inviolable power vested in a person in virtue of which he may do, hold or exact something as his own.[35] Now, in the first place, the word *power* or faculty is used to distinguish right from duty; in virtue of the former "I may", while in virtue of the latter "I ought". But there are two kinds of faculties or powers, physical and moral. By a physical faculty is understood the physical force or ability requisite to attain a definite end, while a *moral* power is one that makes its appeal rather to another's will through knowledge and is ultimately founded on the moral law. This distinction is all the more important in view of the fact that many like Hobbes, Hegel, Mill and Bentham have either explicitly or implicitly identified right with might, by asserting that right is the right to use force—a principle, which is destructive of all moral obligation and of all civil and international peace. Moreover, such a principle, in its final analysis, rather denies than affirms the existence of rights.

In the second place, the word *inviolable* is used, since to every right corresponds a strict duty in another respect to that right, so much that any violation of the right involves the guilt of moral wrong-doing. Even though might should triumph over right its vindication is as inevitable as the moral law is immutable and universal. "Res clamat domino" before, during and after its

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33. Zigliara, T. M., *Summa Philosophica*, Vol. III, p. 125.

34. Suarez, F., *De Legibus*, Lib. I. Cap. ii n. 5: "Et juxta posteriorem et strictam juris significationem solet proprie jus vocari facultas quaedam moralis."

35. Cf., e.g., Tanquerey, Ad., *Synopsis Theologiae Moralis et Pastoralis*, 3 Vol., Parisiis, 1906-1907, Vol. II, pp. 7-8.—Le Buffe, F., *Outlines of Pure Jurisprudence*, p. 79.—Cathrein, V., *Philosophia Moralis*, pp. 208-209 (no. 284); etiam N.B. p. 209 (no. 285). —Rickaby, J., *Moral Philosophy*, Lon-

violation. Even defeasible rights are inviolable so long as they are not withdrawn.[36]

The idea, expressed by the words *vested in a person,* is but the logical implication of the idea, expressed by the words *moral power.* Now, a moral power makes its appeal to the will through knowledge. Hence, only rational beings (or persons, for according to Boethius:[37] "Persona est rationalis naturae individua substantia") can be said to have rights. And this holds true, whether the rational being at the time have the actual use of reason or not. Thus, infants, the insane, the drunk, the sleeping, etc. have rights.[38] Animals, however, have not.

The words of the definition *do, hold or exact something* express the threefold object or matter of right: (a) an action to be done or omited by oneself (to do); (b) an action to be done or omitted by another (exact); (c) some good, external or internal, whether of body or soul (to hold or exact).[39] The words *as his own* are added to show that this "something" (of which there is question) is ordered or stands referred to him in preference to other persons,[40] who being also autocentric beings have in turn the same threefold matter referred to them in preference to others. What is mine is not another's and vice versa. If there is a clash of rights, it can be but apparent, for a real clash would be inconsistent with the belief in a Divine Plan, executed by an omniscient and all just Designer and Overseer.

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don, 1923, p. 244.—Suarez, F., *De Legibus,* Lib. I, Cap. ii n. 5.

36. Cronin, M., *The Science of Ethics,* 2 Vols., New York, 1920 & 1917 editions, Vol. I, p. 662, note 3: "The existence of defeasible rights, or rights that can be withdrawn, does not affect the view stated above that they are inviolable. For even defeasible rights are inviolable as long as they remain."

37. Boethius (Cf. Migne, *Patrologiae Cursus Completus,* Series Latina, 221 Vol., Parisiis, 1844-1864; Vol. 63 et 64 for Boethius), *De Duabus Naturis et Una Persona* (Vol. 64). The passage quoted above is cited by St. Thomas in his article on "De Definitione Personae", *Summa Theologica,* I Q. XXIX, Art. I ad 1.

38. Cf., e.g., Cathrein, V., *Philosophia Moralis,* pp. 233-236 (no. 322-326).

39. Cf., e.g., Le Buffe, F., *Outlines of Pure Jurisprudence,* pp. 79-80.—Tanquerey, Ad., *Synopsis Theologiae Moralis et Pastoralis,* Vol. II, p. 8.

40. St. Thomas, *Summa Theologica,* I Q. XXI, Art. I ad 3: "Dicitur autem esse suum alicujus quod ad ipsum ordinatur."

ARTICLE II — ORIGIN OR BASIS OF RIGHTS

IMPORTANCE OF THE QUESTION

Important as the correct conception of right may be, of still greater importance (at least as far as the United States is concerned) is the origin or basis of human rights. For the past fifty years, American high schools, colleges and universities have been so infested with false and pernicious theories on right,[41] that it is no wonder that even the judiciary fails to acknowledge the true and only source of all rights, namely, the moral law engraved on the hearts of all men by God Himself. The following quotation, from a text in common use in political science courses to-day, is typical: "No law or rights existed before the state arose."[42] In the face of such facts, of such schooling, one is not startled to hear Judge Gary and others of the American Bar assert: "Men speak of natural rights. But I challenge anyone to show where in nature any rights have ever existed or were recognized, until there was established for their declaration a duly promulgated body of corresponding laws."[43]

KANTIAN THEORY

According to Kant,[44] that is morally good or morally evil, which conforms or does not conform with the dictates of reason. He admits,

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41. *America,* 32::12 (January 3, 1925), p. 279: "In what non-Catholic college will the student find a clear, unhesitating acceptance of, for instance, the doctrine of natural rights?...and even our elementary text-books propound the principle that man has no natural rights save such as may be granted by the State or acknowledged by it."— *The Ecclesiastical Review,* Philadelphia, 94::2 (February 1936), p. 172: "For many years 'political science' texts and 'required readings' have been at pains to explain that 'the Theory of Natural Rights is an exploded theory no longer believed in by any scholar of note', apologizing for mentioning such an out-moded idcology in the company of the modern intelligenzia." In an article, entitled "Changing the Constitution" by Basil R. Reuss).

42. Gettell, R. G.,*Introduction to Political Science,* New York, 1910, p. 87.

43. Judge Gary of the U. S. Steel Corporation in a speech at the Waldorf, New York; quoted and commented on by Paul L. Blakely in *America,* 32::21 (March 7, 1925), pp. 501-502.

44. For a general discussion of the false theories, in the light of a half

it is true, the existence of a natural law, a universal, absolute and necessary law of nature—but denies this to be an emanation of a higher law, from which it derives its efficacy. Why must I do good or avoid evil? Because if I do otherwise, I shall do violence to my rational self, an alternative which no rational being can accept and, therefore, no alternative at all. I must, therefore, absolutely, and this Kant rightly calls the "categorical imperative." In so far as man is influenced solely by this absolute dictate of practical reason and is not influenced by other motives, in so far is he free and self-determined. Hence, Kant says, the perfection of the will, the pure self-determination of the rational will consists in "the autonomy of reason". So understood, reason is a law unto itself—the ultimate, absolute norm or standard of all morality, of all obligation, of all duties and all rights.

A careful reading and analysis of Kant will more fully disclose how he utterly fails to offer a satisfactory explanation of the origin or basis of human rights. However, it may be said that, if the autonomy of the human person is absolute, then, the individual will respect that autonomy in so far as he will exercise his liberty. But others also will do so. Hence, there will be a conflict, with one of two inevitable consequences: Either the stronger will will impose itself on the weaker and then might will mean

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century or so ago, the student may find of interest, among other works: Fouillée, A., *L'Idée Moderne du Droit en Allemagne, en Angleterre et en France,* Paris, 1878; Jouffroy, Th., *Cours du droit naturel,* 2 Tomes, Paris, 1876, 5th ed. N.B.:-de Wulf, M. (In D. Mercier's *A Manual of Modern Scholastic Philosophy,* 2 Vols., London, 1923) says that Jouffroy further accentuates the Cartesian tendencies of Cousin's school (Vol. I, p. 473); while Fouillée shows an indebtedness to Kant (Vol. I, p. 484)—*Kants Saemmtliche Werke,* ed. Hartenstein, 10 Bde., Leipzig, 1838-1839, new edition 1867-1868—The student may find more convenient a condensed collection of Kant's political ideas, edited and annotated by A. Aulard under the title: *Kant: Écrits Politiques,* Paris, 1917.—Of similar convenience to the student, may be, among other works: Mercier, D., *A Manual of Modern Scholastic Philosophy,* Vol. II, pp. 265-266 (J. Halleux); Cathrein, V., *Philosophia Moralis,* pp. 155-157 and pp. 218-223; Rickaby, J., *Moral Philosophy,* pp. 115-118; Turner, W., "Kant" (with the bibliography attached thereto, for selective reading) in *The Catholic Encyclopedia,* New York, 1907-1914 (K. of C. Edition).

right (which is diametrically opposed to the true source of all moral obligation, the moral law; and which is contrary to the conception of right as a "moral, inviolable power"); or there will have to be a social compact as the ultimate basis of all rights (which is equivalent to denying the existence of natural rights as such).

Besides, reason is not autonomous, as is borne out by the fact that in each and everyone there is a law more deeply imbedded than the law of reason. There are certain actions in regard to God, to himself and to his neighbor, that man realizes he is bound to do or to omit—and the non-compliance with which will constitute, not merely a breach of reason, from which he can free himself easily enough[45] (reason being at the same time legislator and legislated), but also a breach of a higher law, which rewards the good and punishes the evil. This obligation, from which there can be no disengaging, the autonomy of reason fails to explain.

HEGELIAN THEORY

According to Spinoza, Schelling, Fichte, Hegel, and Pantheistic Monists[46] in general, there is but one substance,—a logical deduction from Spinoza's false conception of substance as that which exists by itself and needs nothing else for its existence.[47] This one substance is for Schelling "The Absolute", for Fichte "The Pure Ego", for Hegel "The Logical Concept", and so on for the others. Everything is but a mode or determination of this universal

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45. Wilson, James, Works, 2 Vols., Chicago, 1896, Vol. I, pp. 102-103: "If the person, on whom the obligation is imposed, is the same as he who imposes it, he can disengage himself from it whenever he pleases: or rather, there is no obligation."

46. Hegel. G., *Saemmtlicke Werke,* 23 Bde., Stuttgart, 1927-1935.—For a condensed exposition of Hegel's Theory, the student may consult, among other works: Hegel, G., *Philosophy of Right* (trans. by Dyde), London, 1896; Mercier, D., *A Manual of Modern Scholastic Philosophy,* Vol. II, p. 266 (J. Halleux); Cathrein, V., *Philosophia Moralis,* pp. 389-390, 408; Boedder, B., *Natural Theology,* London, 1921, pp. 113, 114, 207, 208; Turner, W., "Hegelianism" (with the bibliography attached thereto, for selective reading) in *The Catholic Encyclopedia.*

47. For the true concept of substance, cf., e.g., St. Thomas, *Summa Theologica,* I Q. III, Art. V ad 1.

substrate, a manifestation or embodiment of the Absolute, "The Only One".[48] And among these different modes or aspects of the Absolute or divine reason, the State must be numbered. Thus, Hegel says: "The State is the social substance that has arrived at self-consciousness....It is the *rationnel* of itself and for itself ...it is the terrestrial divinity."[49]

It follows, then, that the State is not the creature of individuals, for it exists before individuals and has its own reason for its existence and its own end to pursue. Since it is a manifestation of the divine being, its will is sovereign, and individuals have no claim against it as to rights that may be founded on their nature. The State is a law unto itself, unaccountable to others, at once the source of all rights and all duties, as long as its will can be superimposed by force. The Hegelian Theory is, therefore, in the final analysis not only pantheism, repellant to internal and external experience alike, but also the Reign of Might, the Deification of the principle: "Might is right".[50]

THEORY OF HOBBES

According to Hobbes[51], man's innate craving for self-satisfaction or personal well-being is the standard of all morality and the source of all rights. He maintains that primitive man is at heart an egoist seeking himself in all things, in nature anti-so-

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48. Condemned by the Vatican Council; cf. Denzinger, H. (C. Bannwart et J. Umberg), *Enchiridion Symbolorum*, etc., Friburgi Brisgoviae, 1932, no. 1782.

49. Cf. Hegel, G., *Philosophy of Right* (trans. by Dyde); cf. also Garner, J., *Political Science and Government*, New York, 1928, pp. 230-234 for an analysis and criticism of Hegel's metaphysical theory of the State.

50. There are some here in America, who believe that the U. S. has its due proportion of Hegelians. Cf., e.g., *America*, 32::12 (January 3, 1925), 37::16 (July 30, 1927), pp. 365-366.

51. Complete edition of his works, English and Latin, by Sir Wm. Molesworth, 11 Vols., London, 1839-1845.—For the work in hand, the student will find helpful and convenient: Hobbes, T., *Leviathan*, Oxford, 1881; Hobbes, T., *Moral and Political Works*, London, 1750; Hobbes, T., *Oeuvres philosophiques et politiques*, 2 Tomes, Neuchatel, 1787; Hoenigswald, R. von, *Hobbes und die Staatsphilosophie*, Muenchen, 1924; Clarendon, E., *A brief view and survey of the dangerous and pernicious errors to church and*

cial,[52]—the State being but an after-thought, a human institution superadded to his nature. All things are common to all men, everyone having the right to do as he pleases.[53] But, since man is ruled in all things solely by selfish cupidity, a clash[54] inevitably ensues; man is in fear of his very life and the fruits of his labor;[55] security and progress are impossible. His own welfare impels him to combine in common interest; he creates the State by mutual consent; he gives all his rights to the New Creature, in order that he might be safeguarded and benefited by being protected against the selfishness of others, although his own is thereby curbed. But he still remains selfish in nature, and, therefore, finds it necessary to vest all power in this Incarnate Self of Everybody.[56] What It determines (backed by the force of

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state in Mr. Hobbes' book, entitled Leviathan, Oxford, 1676; Mercier, D., *A Manual of Modern Scholastic Philosophy*, Vol. II, pp. 266-267 (J. Halleux); Cathrein, V., *Philosophia Moralis*, pp. 215, 382, 388; Rickaby, J., *Moral Philosophy*, pp. 297-307; Fox, J., "Utilitarianism" (with the attached bibliography, for selective reading) in *The Catholic Encyclopedia*.

52. Hobbes, T., *Leviathan*, C. XIII: "Againe, men have no pleasure, (but on the contrary a great deale of griefe) in keeping company, where there is no power able to over-awe them all."

53. *Ibid.*, C. XIII: "The notions of Right and Wrong, Justice and Injustice have there no place. Where there is no common power, there is no Law: where no Law, no Injustice....It is consequent also to the same condition that there be no Property, no Dominion, no Mine and Thine distinct; but onely that to be every mans, that he can get; and for so long, as he can keep it."

54. *Ibid.*, C. XIII: "Hereby it is manifest, that during the time that men live without a Power to keep them all in awe, they are in that condition which is called Warre; and such a warre, as is of every man, against every man."

55. *Ibid.*, "In such condition there is no place for Industry, because the fruit thereof is uncertain: consequently no Culture of the Earth; no Navigation, nor use of the commodities that may be imported by Sea; no commodious Building; no Instruments of moving, and removing such things as require much force; no Knowledge of the face of the Earth; no account of Time; no Arts; no Letters; no Society; and which is worst of all, continuall fear and danger of violent death; And the life of man, solitary, poore, nasty, brutish. and short."

56. *Ibid.*, C. XVII: "The only way to erect such a Common Power...is

all and accountable to none for fear of the greater evil of individual selfishness) is right or wrong, independent of any norm, save in a general way for the fact that each one deems such a creature necessary for his welfare.

What is the logical conclusion of such a doctrine? The social contract, the will of the legislator, the State (though, ultimately, utility) is the source of all rights and all duties. That which the State enforces is law, is right. But what is this, if not a reversal to the Hegelian fallacy that "Might is Right"[57] and that all rights come from that personification of Might created by man and known as the State? Moreover, since the individual reason alone can make known the individual's welfare and the obligation of promoting it, the theory of Hobbes is open to the same objections that were advanced against the Moral Rationalism of Kant.

What Hobbes claims for the individual (Egoistic Utilitarianism),[58] Bentham and Mill (Altruistic Utilitarianism)[59] advocate in behalf of Society, though Bentham remains very much of an egoist notwithstanding.[60] Says De Wulf:[61] "In ethics he

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to conferre all their power and strength upon one Man, or upon one Assembly of men, that may reduce all their Wills, by plurality of voices, unto one Will: which is as much as to say, to appoint one Man, or Assembly of men to beare their Person; and every one to owne, and acknowledge himselfe to be the Author of whatsoever he that so beareth their Person, shall Act, or cause to be Acted, in those things which concerne the common Peace and Safetie; and therein to submit their Wills, every one to his Will, and their Judgements, to his Judgment. This is more than Consent, or Concord; it is a reall Unitie of them all, in one and the same Person, made by Convenant of every man with every man, in such manner, as if every man should say to every man, *I Authorise and give up my right of Governing myselfe, to this Man, or to this Assembly of men, on this condition, that thou give up thy Right to him, and Authorise all his Actions in like manner.* This done, the Multitude so united in one Person is called a COMMONWEALTH, in latine CIVITAS."

57. Hobbes, T., *The Elements of Law Natural and Politic,* Cambridge, 1928, Pt. I, Ch. XIV, No. 13: "Out of which may also be collected, that irresistible might in the state of nature is right."

58. Its principle is: "Diliges te super omnia et alios homines propter te."

59. Its principle is: "Vive, propter bonum societatis."

60. Bentham, J., Works, 11 Vols., ed. by Sir J. Bowring, 1838-1843.—

[J. S. Mill] adhered to the Benthamite principle of the greatest happiness of the greatest number, but was more genuinely altruistic in his interpretation.''

THEORY OF ROUSSEAU

Rousseau[62] merely follows in the footsteps of Hobbes, for Rousseau's *Social Contract* is but an adaptation and modification, so to say, of the *Leviathan* of Hobbes, For the one, man is anti-social; for the other, merely non-social.[63] According to Rousseau, primitive man is by nature solitary, happy, contented, sufficient for himself, nature serving his needs and his desires. Essentially equal[64] and free,[65] he leaves others alone and desires

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Bentham, J., *An Introduction to the Principles of Morals and Legislation,* Chapter I, first two sentences: '' Nature has placed mankind under the governance of two sovereign masters, *pain* and *pleasure.* It is for them alone to point out what we ought to do, as well as to determine what we shall do.''—Bentham. J., *Deontology,* ii: ''Dream not that men will move their little finger to serve you, unless their advantage in doing so is obvious to them. Men never did so and never will while human nature is made of its present materials. But they will desire to serve you when by so doing they can serve themselves.''

61. In Mercier's *A Manual of Modern Scholastic Philosophy,* Vol. II, p. 478.

62. Rousseau, J., *Oeuvres Complètes,* 13 Tomes, Paris, 1887-1906; cf. especially his *Social Contract.*—For a brief exposition of Rousseau's tenets, the student will find helpful: Mercier, D., *A Manual of Modern Scholastic Philosophy,* Vol. II, p. 267 (J. Halleux); Cathrein, V., *Philosophia Moralis,* pp. 382, 388, 395-396; Rickaby, J., *Moral Philosophy,* pp. 297-307; Zigliara, T. M., *Summa Philosophica,* Vol. III, pp. 223 sq.; Macksey, C., ''Society'' (with the suggested bibliography, for selective reading) in *The Catholic Encyclopedia.*

63. Le Buffe, F., *Outlines of Pure Jurisprudence,* pp. 135 ff. cites in refutation: Aristotle, *Politica,* Book I. 2 (Ross); St. Thomas, *De Regimine Principum,* Lib. I, cap. I; Suarez, F., *De Legibus,* Lib. I, c. III, n. 3; Burlamaqui, J., *The Principles of Natural and Politic Law,* 2 Vols., Cambridge, 1807, Vol. I, Pt. II, Ch. IV, Sect. XI-XIV incl.; Rutherforth , T., *Institutes of Natural Law,* Baltimore, 1832, Bk. I, Ch. I; Blackstone, W., *Commentaries on the Laws of England,* Vol. I, Introd., Sec. 2, p. 42; Wilson, J., *Works,* Vol. I, Ch. VII, p. 270.

64. In refutation thereof, cf., e.g., Le Buffe, F., *Outlines of Pure Jurisprudence,* p. 124.

65. In refutation thereof, cf., e.g., Rickaby, J., *Moral Philosophy,* p. 305.

others to leave him alone. But in the course of time, his innate genius creates new conveniences, engenders new wants. To satisfy these more rapidly and efficiently, he enters into transitory compacts with his fellows. Jealousies, quarrels and conflicts are born; man has become vitiated by Society. In sheer necessity, although prizing his innate freedom above everything, he enters into a compact for protection. He pools all his rights, his will and even his personality in a Moral Creature, the State. He is left only the empty satisfaction that in obeying it he obeys himself.

Much might be written concerning Rousseau's striking inconsistencies and such of his false postulates as: (a) all men are created equal, (b) man is born free, (c) none can be bound to obey another without his own consent, (d) man is non-social and Society originates simply as a result of utility, and subsequently of necessity, etc. However, suffice it to say, that his theory is equivalent to denying the existence of natural rights as such, for if man is primitively free of all duties, he is naturally devoid of all rights. Moreover, if subsequently he pools these supposed-to-be rights, as Rousseau so inconsistently maintains, there are no rights that he receives in return that do not owe their origin directly to the creature in whom he originally pools them. According to Rousseau, therefore, whether he says so in so many words or not, man either never possessed any rights or, if he did, all those that he does possess he owes not to nature but to the State. Moreover, Rousseau stands condemned on the same utilitarian grounds as Hobbes.

SPENCERIAN THEORY

According to Herbert Spencer,[66] rights are evolved. He begins with stating the law of evolution as "an integration of matter and con-

66. Spencer, H., *Works*, 18 Vols., New York and London, 1914; especially *First Principles, Political Essays, The Study of Sociology, The Man Vs. the State.*—The student will find convenient for general reference: Mercier. D., *A Manual of Modern Scholastic Philosophy*, Vol. II, pp. 267-268, 333-334, 479-480; Cathrein, V., *Philosophia Moralis*, pp. 20-21 (no. 26), 102-103 (no. 139), 160-161 (no. 218), 405-408 (no. 593, 595); Le Buffe, F., *Outlines of*

comitant dissipation of motion, during which the matter passes from an indefinite incoherent homogeneity to a definite coherent heterogeneity, and during which the retained motion undergoes a parallel transformation.''[67] Spencer, then, applies this materialistic principle of evolution to all the human sciences, even to ethics and sociology. He maintains that the moral sense is but a product of evolution from egoism to altruism, until by various compromises perfect harmony is established between them, pleasure without the admixture of pain resulting, because of the perfect subserviency of man's egoistic tendencies to the common welfare. In attempting to explain the origin and nature of the obligation that brings about this adjustment, Spencer distinguished two kinds of sanctions: Internal and external. The former induces man to act in view of the utility or the harmfulness of the act; the latter impels him by fear of various punishments. Spencer, then, very elaborately goes on to show, how, at first, man (who was no more than a brute, devoid of freedom and spirituality) was deterred from doing certain actions because of the fear of the wrath of his ferocious associates (sanctio socialis). In the course of time, however, after one of these associates, by his audacity and ingenuity, had achieved the leadership of his fellows, man abstained from or did certain things to which a punishment was or was not attached by the prince (sanctio civilis). Later in the process of this moral evolution, man began to be deterred by the fear of the departed (especially of princes) who were believed to return and to punish certain actions (sanctio religiosa). Unconsciously, due to the pressure of these internal and external sanctions, the idea of obligation was gradually evolved, attached to many ideas and extended to others (by what Spencer calls an ''association''[68] of ideas) which were omitted solely because of their intrinsic maliciousness. Then, in true Uto-

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Pure Jurisprudence, pp. 23, 152-154; various articles in *The Catholic Encyclopedia* on ''Spencer'' (Cf. Index).

67. Spencer, H., *First Principles,* Para. 144.

68. V. Cathrein very felicitously call it a ''confusion'' of ideas. (*Philosophia Moralis,* p. 161).

pian fashion, he pictures the day, evolution having wrought the Midas change, when man will be spurred on no longer by obligation but rather by that perfect, unadulterated delight with which will always be joined his own and Society's good!

Spencer advances a materialistic conception not only of the individual, but also of Society. According to him, Society is but an organism subject like all other organisms to his pet law of evolution. Right is but an expression of the needs of this social organism, so much so that the relations, which bind the individual members of Society together, do not materially differ from the biological laws that bind cells together in the living body, a doctrine which is equivalent to saying that the individual (with all his rights) is absorbed in the State, just like in biology the primitive autonomous unicellular individual is absorbed, in the process of development, by the higher organic form of life.

The fallacious implications of this theory are manifold. First, it is too materialistic. Secondly, ignoring the essential difference between brute and man, it rather denies obligation than explains it, for there can be no obligation strictly so-called and hence no rights where there is no spirituality and no freedom; as such it is an explanation contrary to fact not only historically but also psychologically and ethically as well. Moreover, it is but another form of altruistic utilitarianism and open to the same objections that were noted above.

Partially plausible as some of the above theories might at first appear, none of them fully and satisfactorily explains the true origin or source of rights. Kant would have us believe that all rights come from *a priori* principles of the individual reason, Hegel from the impersonal reason as identified with the State, Hobbes and other utilitarians from some hedonistic principle, Rousseau from a free combination of individual wills, and finally Spencer as a product of biological factors. None, however, offers anything at all in harmony with the true and only source of all rights, the Divine Reason, the Source of the Natural Law,[69]

69. St. Thomas, *Summa Theologica,* I-II Q. XCI, Art. II c.

a law from which all other laws derive their force and efficacy.[70]

THOMISTIC THEORY

Right was defined above,[71] as that which is due another, according to strict equality, in virtue of an equally strict obligation. Now, according to St. Thomas, this obligation is, strictly speaking, "legal obligation",[72] which he defines as "...ad quod reddendum aliquis lege adstringitur".[73] It follows, then, that according to the Angelic Doctor all rights (as also all duties) are founded on law. In fact, the only relation created by law is this relation, of which right and duty are correlative terms.

In other words, in the solution of the question of the true source of all law or obligation must be sought the solution of the question of the true source or origin of all rights. St. Thomas says that law is a "quaedam rationis ordinatio ad bonum commune, et ab eo qui curam communitatis habet, promulgata".[74] Now, reason can show that there is a God,[75] that He is the Creator of all things,[76] and that He acted with purpose, with a definite end in view.[77] Moreover, it logically follows that He must have taken the means to attain this end by binding His creatures to certain rules of action. This divine directive force is called the eternal law and is defined by St. Thomas as the "ratio divi-

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70. The function of all positive law is to interpret what is enjoined by the Natural Law, to develop its consequences, to provide for its execution and to check its violation. Cf. *Summa Theologica,* I-II Q. XCV, Art. II where St. Thomas enunciates the principle: "Omnis lex humanitus posita a lege naturali derivatur."

71. Cf. C. I, Art. I Definition of Right, "Right as Just Dues".

72. St. Thomas, *Summa Theologica,* II-II Q. XXIII, Art. III ad 1; II-II Q. LXXX, Art. I c.

73. *Ibid.,* II-II Q. LXXX, Art. I.

74. *Ibid.,* I-II Q. XC, Art. IV—According to St. Thomas (*Summa Theologica,* I-II Q. XC, Art. IV) and Billuart, C. R., (*Summa sancti Thomae,* etc., 8 Vol., Parisiis—1878 *De leg.* diss. I art. 3) promulgation does not pertain to the "essence" of law.

75. St. Thomas, *Summa Theologica,* I Q. II; II-II Q. LXXXV, Art. I c.

76. *Ibid.,* I Q. XLIV; I Q. XLV, Art. II c.; I Q. LXV o.; I-II Q. LXXIX, Art. II.

77. *Ibid.,* I Q. XLIV, Art. IV.

nae sapientiae, secundum quod est directiva omnium actuum et motionum.''[78]

St. Thomas, then, goes on with wonderful lucidity to show how all laws are derived in turn from the eternal law.[79] In irrational creatures, this ordination of all things is unconscious and necessary, and is commonly known as the natural physical law.[80] However, in rational creatures, this direction or impulse does not necessitate; men are free agents and as such pursue their end freely. They may choose between the supreme good (their ultimate end) and an apparent good which will lead them away from this end.[81] But while there is no physical necessity to follow this end, there is a moral[82] necessity, which is the will of God imposed on the will of rational creatures. This is known as the natural moral law[83] and is described by St. Thomas as the ''participatio legis aeternae in rationali creatura.''[84]

So much has already been written concerning the existence or non-existence of the natural law, that little more could or need be said here. However, we do maintain that eminent authorities in jurisprudence, philosophy, and theology[85] have effectively defended its existence against its immemorial opponents: atheists, materialists, pantheists and all those who would assert there is no other law but the positive law.

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78. *Ibid.*, I-II Q. XCIII, Art. I.

79. *Ibid.*, I-II Q. XCIII, Art. III.

80. *Ibid.*, I-II Q. XCI, Art. II, ad 3: ''...non potest dici lex nisi per similitudinem.''—Le Buffe, F., *Outlines of Pure Jurisprudence*, p. 16: Physical law is a ''rule of action impressed by God on material and non-free creatures which physically compels to uniform action by an innate compulsion of nature, e.g., the law of gravitation, growth in plants and animals.''

81. Cf. St. Thomas and others on ''Free Will'' and ''Ultimate End of Man''.

82. I.e., affecting the intellect and the will.

83. Le Buffe, F., *Outlines of Pure Jurisprudence*, p. 17: ''Such a law... is called moral because it concerns customary actions (Latin—mores) which actions being volitional, i.e. deliberate and free, are accredited to man as a responsible agent.''

84. St. Thomas, *Summa Theologica*, I-II Q. XCI, Art. II.

85. Among these, of course, St. Thomas.

The question naturally arises: What is meant by a "positive law"? A positive law is nothing else than a law, that is freely made or freely enacted. A natural law, on the other hand, since it is based on the very nature of things, is necessarily enjoined by God. Now, all positive laws (as also all natural laws) are derived from the eternal law, either in so far as they directly proceed from the same Divine Will (divine positive laws) or are derived from the same divinely enjoined natural law (human positive laws).[86] In fact, according to St. Thomas, both these kinds of positive laws, namely, human[87] and divine,[88] are necessary in the Divine Plan. The Angelic Doctor, then, rather elaborately subdivides human positive law,[89] distinguishing between Ecclesiastical and Civil Law, and Jus Gentium and International Law. We need not, however, go into detail on this point, except to mention that Jus Gentium should not be identified or confounded with international law, for Jus Gentium is a law not "between" all nations although general "within" all nations; nor is it the natural law though it flow therefrom. St. Thomas says: "...ad jus gentium pertinent ea quae derivantur ex lege naturae, sicut conclusiones ex principiis."[90] Moreover, it should be borne in mind that "lex humana intantum habet rationem legis, inquantum est secundum rationem rectam; et secundum hoc manifestum est quod a lege aeterna derivatur. Inquantum vero a ratione recedit, sic dicitur lex iniqua; et sic non habet rationem legis, sed magis violentiae cujusdam."[91]

According to the Thomistic theory, therefore, all rights are derived from law. Now, all law is ultimately derived from the Eternal Law, the plan of the Divine Wisdom as directive of all actions and movements. Hence, all rights are ultimately based on the Divine Will, acting under the guidance of the Divine Rea-

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86. St. Thomas, *Summa Theologica,* I-II Q. XCV, Art. II.
87. *Ibid.,* I-II Q. XCI, Art. III.
88. *Ibid.,* I-II Q. XCI, Art. IV.
89. *Ibid.,* I-II Q. XCV, Art. IV.
90. *Ibid.,* I-II Q. XCV, Art. IV—Suarez, F., *De Legibus,* Lib. II, Cap. xvii : "Utrum jus naturale distinguatur a jure gentium."
91. St. Thomas, *Summa Theologica,* I-II Q. XCIII, Art. III ad 2.

son. This is the thesis on the origin or basis of rights, that we posit in this introductory chapter.

ARTICLE III — DIVISION OF RIGHTS

There are, perhaps, as many divisions of right as there are moralists.[92] Classification is something arbitrary, depending on the author's viewpoint and the scope that he outlines for himself in his work. With this in mind, the following division of right is proposed.[93]

ACCORDING TO THE LAW WHICH GIVES RISE TO THE RIGHT

Rights are "natural", if founded on the natural law; "positive", if based on the positive law. This is the distinction that St. Thomas sets forth in his second article on "De Jure",[94] for, as he pertinently observes, there are not only rights that proceed from nature itself but also rights that are conferred by and grounded on some common pact (be that private or public) or by something more unilateral as the ordinance of legitimate authority. Natural right is something absolute, a consequence of nature; positive right is something in itself indifferent, the creature of positive law.

Positive rights, in turn, are further subdivided into divine, ecclesiastical or civil rights, according as they proceed from the divine-positive, the ecclesiastical or the civil laws respectively. However, the principle (noted above) still holds, namely, that all laws properly so-called emanate ultimately from the eternal law and derive all their efficacy and force therefrom.

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92. A cursory perusal of several works on ethics will bear out this contention.

93. For general outline, cf.: Le Buffe, F., *Outlines of Pure Jurisprudence*, pp. 80-85; Cathrein, V., *Philosophia Moralis*, pp. 223-230 (no. 304-316); Pruemmer, D., *Manuale Theologiae Moralis*, Vol. II, pp. 3-4.

94. St. Thomas, *Summa Theologica*, II-II Q. LVII, Art. II.—Cathrein, V., *Philosophia Moralis*, p. 229 (no. 313).

ACCORDING TO ORIGIN According to origin, rights may be connatural or acquired.[95] By a connatural or congenital right is meant a right, which springs from the very nature of man as a person, independent of any action on his part or on that of others in his behalf; it is something, that comes to him with birth (e.g., the rights to life, to acquire property, etc.). On the other hand, a right is said to be acquired or adventitious, if it springs from the deed of man whether on his own part or on that of others in his behalf; it is something annexed to his personality, something that has come to him in virtue of something apart from his very existence as a person (e.g., the right to this particular piece of property, real or personal). Needless to say, all connatural rights are natural, though acquired rights may be either natural or positive.

Some authors, especially the older ones, use the term "absolute and relative rights" to signify natural and acquired rights, though others use it to connote an entirely different idea. Thus, for example, Ch. Lahr, S.J.[96] uses the term absolute and relative rights in the sense of moral and legal rights,[97] i.e., rights founded on the moral and the civil laws respectively.

ACCORDING TO SUBJECT Men speak also of public and private rights.[98] By the former is understood a right, which inheres "in the State or its governmental agents or in private persons as against the State or its agents",[99] and has as immediate end the common good. Public right, in turn, may be either ecclesiastical or civil. On the other hand, a right is said to be private, when it inheres "in private persons and is assertable only against other private individuals";[100] private

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95. So, for example, in Le Buffe, F., *Outlines of Pure Jurisprudence,* p. 80; Cathrein, V., *Philosophia Moralis,* p. 229 (no. 313); Pruemmer, D., *Manuale Theologiae Moralis,* Vol. II, p. 4.

96. Lahr, Ch., *Cours de Philosophie,* 2 Tomes, Paris, 1923 (24th ed.), Tome II, pp. 170-171.

97. Cf. below, "According to its Relation to Civil Law" (C. I, Art. III).

98. So, for example, in Le Buffe, F., *Outlines of Pure Jurisprudence,* p. 81; Cathrein, V., *Philosophia Moralis,* p. 224 (no. 304).

99. Robinson, W. C., *Elementary Law,* Boston, 1910, Sect. 3.

100. Ibid.

rights have as immediate object the individual good.

ACCORDING TO TRANSFERABILITY

Considered as to their transferability, (or their necessary connection with the subject, in which they reside), rights are said to be inalienable or alienable.[101] Thus, inalienable rights are those that cannot be renounced or transferred, inasmuch as they correspond to and are necessary for the fulfillment of man's essential duties, e.g., the right to life. All other rights are alienable, as they may be renounced or transferred without violating the essential requirements of one's nature, e.g., the right to this particular piece of property. Although one may never renounce or transfer an inalienable right, nevertheless one may for a sufficient reason transfer to another the "exercise" thereof if not the right itself; in fact, sometimes this is imperative, when, for instance, more evil than good would otherwise result.[102]

The existence of inalienable rights is a doctrine dear, not only to all morally sincere people in general, but to Americans in particular. In fact, it was a postulate upon which the American government was conceived and planned: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness."[103]

ACCORDING TO ITS RELATION TO PHYSICAL FORCE

A fundamental and most important division of right is based on the relation that right bears to co-action or physical force. Viewed thus, rights are said to be perfect and imperfect.[104] A perfect or strict right is one, that is so determined as to matter and subject, that

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101. So, for example, in Le Buffe, F., *Outlines of Pure Jurisprudence,* p. 81; Cathrein, V., *Philosophia Moralis,* p. 228 (no. 313); Pruemmer, D., *Manuale Theologiae Moralis,* Vol. II, p. 4; Rickaby, J., *Moral Philosophy,* p. 246; Coppens, C., *A Brief Text-Book of Moral Philosophy,* New York, 1895, pp. 71-72; Lahr, Ch., *Cours de philosophie,* Tome II, p. 171.

102. Cf. C. I, Art. IV Properties of Right, "Collision or Conflict".

103. *The Declaration of Independence*—This doctrine was subscribed to by the American Hierarchy in their National Pastoral on Mexico 1926 (Cf.

physical force may be used to exacting it.[186] It is a right based on justice and as such due by virtue of a "debitum legale",[187] e.g., the right to life, the right to a just compensation, etc. On the other hand, an imperfect[187] right is one, that in and on determined, that physical force may be resorted to in exacting it; it is a right based on some virtue other than justice and thus because of only a "debitum morale",[188] e.g., the right to alms, the right to gratitude, etc. Imperfect rights, therefore, are not strictly speaking "rights", but rather merely "claims".[189] However, the inviolability of an imperfect right may be just as sacred (if not more so) as that of a perfect right; the violation of either one constitutes sinful wrong-doing, whether it be against justice or some other virtue. The gravity of the offense depends entirely upon the particular case.

Moreover, it should be borne in mind that in a well-organized Society, no non-urgent cases can should first appeal to legitimate authority for redress of injury, for it is the head of Society that is legitimately delegated to exercise primary care in man's behalf; otherwise these could be grossly subjective. For in family enduring man's own rights may cannot forget, whether intentionally or inadvertently, that others also have equally just rights. In all cases, the golden norm should be followed: "Do unto others as you would have others do unto you". Only when legitimate authority fails by reason of sphere encroachment with this principle, or when

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[186] *The Redemptorist Review*, Vol. 1, p. 111 ff. (June 1917).

[187] Cf. St. Thomas, *Summa Theologica*, II/II Q. LXII, Art. 1; La Valle, F., *Outlines of Moral Jurisprudence*, pp. 61-62; Donovan, H., *Elements Theologiae Moralis*, Vol. II, p. 8; Tanquerey, Ad., *Synopsis Principiorum Moralis et Pastoralis*, Vol. II, pp. 8-8.

[188] Cf. Tanquerey, Ad., op. cit., Vol. II, p. 8.

[189] Cf. St. Thomas, *Summa Theologica*, II/II Q. LXXII, Art. 1.

[187] Sometimes in "*jus perfectum seu strictum*" is opposed "*jus imperfectum*", which is the benevolence of law, not according to the letter but rather according to the spirit. Cf., e.g., Cathrein, V., *Philosophia Moralis*, p. 224 (ed. 1904).

[188] St. Thomas, *Summa Theologica*, II/II Q. LXXII, Art. 1. "Debitum autem morale est quod aliquis debet ex honestate virtutis."

[189] Brosch, J., *Moral Philosophy*, pp. 288-289.

appeal to authority cannot be made, may one exercise his right of coaction.[110]

ACCORDING TO ITS RELATION TO CIVIL LAW

Finally, in viewing right in its relation to the civil law, moralists distinguish between what is known as moral and legal rights.[111] As was remarked above,[112] a moral right is a right in the true sense of the word, because it is a right based on the moral law, making its appeal to another's will through knowledge and, as such, defined as a "moral and inviolable power vested in a person by which he may do, hold or exact something as his own". On the other hand, by a legal right is understood a right that is determined and enforced by the laws of the State. The distinction, however, is really arbitrary, as every true legal right must be fundamentally a moral right or it is no right at all. And the reason for this is that all rights come from law, and that all laws in turn are derived from the moral law, as so many specific determinants thereof.[113] As St. Thomas observes, human law is just only in so far as it is derived from the eternal law, while a law not so derived is not a law at all but rather a species of violence. In fact, the Angelic Doctor, for the sake of clarity, rather tritely calls the former "leges legales".[114]

Hence, legal rights are determined and enforced, though not created by the laws of the State.[115] One cannot have a legal right without a moral right, though the converse is not true. The State, as a matter of fact, has never even attempted to define all

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110. Cf. Shaw, Lord of Dunfermline, *The Law of the Kinsmen,* New York, 1923, Address I, p. 113.

111. Le Buffe, F., *Outlines of Pure Jurisprudence,* pp. 83-84.—Lahr, Ch., *Cours de philosophie,* Tome II, pp. 170-171.

112. Cf. C. I, Art. I Definition of Right, "Right as a Moral Faculty".

113. Cf. C. I, Art. II Origin or Basis of Rights, "Thomistic Theory".

114. St. Thomas, *Summa Theologica,* I-II Q. XCVI, Art. IV.

115. Robinson, W. C., *Elements of American Jurisprudence,* Boston, 1900, No. 122: "Thus every right which the law recognizes is either an essential natural right or is included in it as its necessary incident and consequently rests upon the same authority, is enforced by the same sanction, and inheres in the person who possesses it as his natural endowment and not as a mere concession of the State."

man's natural rights.[116] It has but singled out the more salient ones, fully realizing that these "cannot be invaded without detriment to Society itself, either through the loss entailed upon the individual or through the disturbance of the public peace and order."[117] In fact, the Natural Law has left so many thousands of apparently conflicting rights undetermined,[118] that in the best interest of Society, it is the State's bounden duty to determine them, and in so doing to enumerate certain legal immunities or rights. In the final analysis, a legal right, therefore, is nothing else than a moral right defined and enforced by the State; rather it is no right at all but merely a juridic inviolability, guaranteed by the civil law, against unjust transgression on the part of others.[119]

ARTICLE IV — PROPERTIES OF RIGHTS

COACTION OR VINDICATION

Three qualities or properties are ordinarily attributed to right, namely, vindication, collision and limitation.[120] By vindication[121] or coaction is understood the right to use physical force in exacting one's just dues. Now, this seems but reasonable, for, if one has the moral power to hold or do something, he

116. For example, the Supreme Court of the U. S. made this observation in the Oregon Parochial School Case. (Cf. Pierce et al. *v.* Society of Sisters, 268 U. S. 510).

117. Robinson, W. C., *Elements of American Jurisprudence,* No. 121.

118. Rickaby, J., *Moral Philosophy,* p. 359.

119. Lahr, Ch., *Cours de philosophie,* Tome II, p. 171.

120. Cf., e.g., Zigliara, T. M., *Summa Philosophica,* Vol. III, pp. 126-127.

121. Vindication, as used here, is limited to meaning "the warding off of injury intended."—St. Thomas and others use the term in a more general sense so as to include also the reparation or atonement for the offense committed. Taken thus, it may be defined as the: "Ultio injuriae per aliquod malum poenale inflictum ei qui nos culpabiliter laesit aut laedere conatus est." (Footnote to the *Summa Theologica,* II-II Q. CVIII, Art. I, Taurini edition, 1915)—Cf. also Pruemmer, D., *Manuale Theologiae Moralis,* Vol. II, p. 467.

must also have the moral power to exact it; if he has the right to the end, he must have the right to the means to attain that end. Now, as St. Thomas observes, coaction cannot be exerted on the will of man; coaction can affect only the "actus imperati" of man, i.e., it can compel the exterior members to function contrary to the commands issued by the will.[122] This simply means that one has the right to use physical force to direct exteriorly the actions of others, so as to safeguard one's own rights. Moreover, not only has one the right to do so, but also in so doing he may be practicing the virtue of vindication[123] or some other virtue according to the motive he has in vindicating his rights.[124]

Ordinarily, however, a private individual may not use physical force in exacting his just dues.[125] After all, he is a social being, by nature made to live in Society.[126] Now, he would unduly disturb the good order and tranquillity, necessary to Society,[127] were he to take the law into his own hands and attempt to vindicate rights that are perhaps only apparently violated. His fellow men would be inclined to do the same; neither their liberty nor his would be safeguarded. The guardian of the common good must arbitrate and vindicate. This vindication, however, can come from him alone who has the care of the common good, in other words, from the lawfully constituted authority in the particular community.[128] To it alone, therefore, ordinarily pertains the exercise of the right of coaction, a right which must be so delegated in every well-established community.

Nevertheless, occasionally, in urgent cases or where no such authority exists, one may personally use physical force in vindicating his rights. But in thus "taking the law into his own

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122. St. Thomas, *Summa Theologica,* I-II Q. VI, Art. IV.

123. *Ibid.,* II-II Q. CVIII, Art. I et II.

124. Pruemmer, D., *Manuale Theologiae Moralis,* Vol. II, p. 467.

125. St. Thomas, *Summa Theologica,* II-II Q. CVIII, Art. I: "...potest esse vindicatio licita, *aliis debitis circumstantiis servatis*" (The italics are ours).

126. Cf. footnote 63 of this chapter; and C. II, Art. II Civil Society or the State, "Origin of Civil Society".

127. Cf., e.g., Cathrein, V., *Philosophia Moralis,* p. 214 (no. 293).

128. St. Thomas, *Summa Theologica,* I-II Q. XC, Art. III ad 2.

hands'', he must remember that in conscience he is allowed to use only such means as are good or at least indifferent in themselves. No matter how good the end, and the vindication of one's rights is such an end, he may never use means intrinsically evil.[129]

COLLISION OR CONFLICT

In the second place, the attribute of collision or conflict[130] is predicated of right. By collision is understood an apparent conflict of rights, i.e., a clash in which one right seems to conflict with another, apparently equally founded. The word ''apparent'' is used, since there cannot be any real objective conflict, strictly speaking.[131] As has already been noted, all rights come from law.[132] Now, all law is law in so far as it is derived from the Eternal Law.[133] But the Eternal Law is nothing else

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129. ''The end justifies the means'' has but one legitimate meaning, namely, that for means, morally ''indifferent'', a good end ''makes just'' (Latin: ''justificare'', i.e., ''justum facere'') those same means, while a bad end renders them evil.—Le Buffe, F., *Outlines of Pure Jurisprudence,* gives a clear and comprehensive scheme on the question of the double effects of vindicative action (Cf. pp. 107-109).—St. Thomas, *Summa Theologica,* II-II Q. LXIV, Art. VII: ''Nihil prohibet unius actus esse duos effectus quorum alter solum sit in intentione alius vero sit *praeter* (the italics are ours) intentionem. Morales autem actus recipiunt speciem secundum id quod intenditur, non autem ab eo quod est praeter intentionem, cum sit per accidens, ut ex supra dictis patet.'' (Q. XLIII, Art. III et I-II Q. I, Art. III ad 3).

130. Cf. Zigliara, T. M., *Summa Philosophica,* Vol. III, pp. 126-127—Cathrein, V., *Philosophia Moralis,* pp. 231-232 (no. 319)—Le Buffe, F., *Outlines of Pure Jurisprudence,* pp. 110-115– Coppens, C., *A Brief Text-Book of Moral Philosophy,* pp. 72-73.

131. Dicey, A., *A digest of the law of England with reference to the conflict of laws,* Boston, 1896, Introduction pp. 12-13: ''The defect, however, of the name is that the supposed 'conflict' is fictitious and never really takes place....The term conflict of laws has been defended on the ground of its applicability not to any collision between the laws themselves, but to a conflict in the mind of a judge on the question which of two systems of law should govern a certain case. This suggestion gives, however, a forced and new sense to a received expression.''

132. Cf. C. I, Art. II Origin or Basis of Rights, ''Thomistic Theory''.

133. St. Thomas, *Summa Theologica,* I-II Q. XCIII, Art. III.

than the "ratio divinae sapientiae secundum quod est directiva omnium actuum et motionum".[134] To suppose, therefore, a real conflict of rights would be to suppose conflict or contradiction in the Divine Will,—which is preposterous. In point of fact, every right is limited by other rights,[135] just as in the human organism the function of one member is limited by those of the others.

However, due in large part to selfishness, trouble often arises in determining which right really is limited and which limiting, which right is to prevail and which to be subordinated or suspended; although in the final analysis there is and can be but one moral inviolable power at stake, the others being but mere claims.[136] The principles regulating this apparent conflict can be at most general[137] and merely directive, and must be applied with that detached judgment commonly known as judicial poise of mind. They may all be reduced to three:[138] (1) That right should prevail, that is based on the higher law, or that is more genuine as to title or more necessary to the common good;[139] hence, a natural right should prevail over a positive right,[140] a connatural over an acquired, an inalienable over an alienable,[141] a public over a private, a perfect over an imperfect, etc.; (2) That right should prevail, that concerns nobler, more necessary or universal matter; thus, rights concerning the soul should come before those concerning the body, rights concerning the necessi-

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134. *Ibid.*, I-II Q. XCIII, Art. I.

135. Cf. below, "Limitation" (C. I, Art. IV).

136. Coppens, C., *A Brief Text-Book of Moral Philosophy*, p. 72—Otherwise, that power would be inviolable as well as violable, which is a contradiction in terms.

137. I.e., subject to particular circumstances, that may dictate otherwise.

138. Cf., e.g., Cathrein, V., *Philosophia Moralis*, p. 232 (no. 319).

139. Cf., e.g., St. Thomas, *Summa Theologica*, II-II Q. XXXIX, Art. II ad 2.

140. Ordinarily so, though a clearly defined positive right prevails over a vaguely defined natural right. So Le Buffe, F., *Outlines of Pure Jurisprudence*, p. 113.

141. Ordinarily so, though the exercise of inalienable rights may have to be suspended if more evil results than good. So Le Buffe, F., *op. cit.*, p. 113.

ties of life before those concerning the comforts or superfluities, etc.; (3) One should have due regard for persons; thus, God should be preferred to self and neighbor, self to neighbor, relative to stranger, etc.[142] In general, one may say with Burlamaqui:[143] "The general principle to judge rightly of this subordination is, that the stronger obligation ought always to prevail over the weaker. But to know afterwards which is the stronger obligation, we have only to attend to the very nature of our duties, and their different degrees of necessity and utility; for this is the right way to know in that case the will of God."

LIMITATION Perhaps the most basically significant of the attributes predicated of right is that of limitation.[144] The fact, that men do not properly understand limitation, lies at the root of perhaps every apparent conflict or collision of rights. After all, the Divine Plan is one magnificently integrated scheme, with every creature, whether irrational or rational, free in its own way yet limited by a certain definite end to fulfill in this Divine Scheme, in which all is ultimately ordered to the greater honor and glory of the Supreme Architect and Creator. As a believer in this doctrine, as one rationally must be, it is no more than logical to conceive of rights as being limited. Now, rights are limited in a twofold manner: first, by the end for which the right has been conceded; and, secondly, by the duties that the subject of the right may be bound to observe.[145] These two general principles are but necessary corollaries of the concept of the correlativity of right and duty, namely, that one has rights because one has certain duties, to the fulfillment of

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142. St. Thomas, *Summa Theologica*, II-II Q. XXVI "De Ordine Charitatis"—though a negative duty to a stranger should prevail over an affirmative duty to a relative. So Le Buffe, F., *Outlines of Pure Jurisprudence*, p. 114.

143. Burlamaqui, J., *The Principles of Natural and Politic Law*, Vol. I, Pt. II, Ch. IV, Sect. XXII.

144. Cf., e.g., Zigliara, T. M., *Summa Philosophica*, Vol. III, p. 126—Le Buffe, F., *Outlines of Pure Jurisprudence*, p. 112.

145. Schratz, A., Unpublished philosophy notes, given at the University of Dayton, Dayton, Ohio, 1917-1918.

which duties these rights are necessary (man's fundamental duty, of course, being to reach his rational end); and that one, in turn, has duties because others have rights, which these duties have as object to respect (the fundamental right being God's right to man's obedience).[146] Thus, in virtue of the first principle, the State is limited in its rights by the end for which these rights have been conceded, namely, the common good; only in so far as these rights are necessary or conducive to the common welfare, may the State invoke them. On the other hand, in virtue of the second principle, I have, for example, the right to amass a fortune; but I have also a duty of justice to give to my employees a just compensation, a duty of charity to give to those who stand in need of my assistance, etc. In other words, my rights are limited by my duties; the former I may cede, the latter, however, I am bound to fulfill.[147] However, an important distinction must here be made, namely, that not all duties, but only those based on the virtue of justice, imply rights on the part of others.[148]

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146. Le Buffe, F., *Outlines of Pure Jurisprudence*, pp. 73-75.

147. Dagneaux, H., *Cours de philosophie*, 2 Tomes, Paris, 1905-1907, Tome II, p. 321.

148. Such so-called rights based on duties other than those of justice should be called "claims", rather than "rights".

CHAPTER II

CIVIC RIGHT IN GENERAL

ARTICLE I — MEANING OF CIVIC RIGHT

"CIVIC" OR "CIVIL"?

We maintain that the moral and inviolable power vested in a member of an organized commonwealth to do, hold or exact something as his own, should be called "*Civic* Right". As a matter of fact, however, it is usually called "*Civil* Right". A summary recourse to the dictionary will hardly settle the argument.[1]

Etymologists tell us that "civic" and "civil" come from the Latin "civicus" and "civilis".[2] Now, St. Isidore of Seville says that "civile est quod ad civitatem pertinet, civicum, quod ipsi cives faciunt."[3] If, then, St. Isidore may be taken as an authority,[4] civil right at least from an etymological viewpoint would mean the right of the State as assertable against the private individual, while civic right would signify the right of the individual as assertable against the State.

However, etymology is one thing, accepted usage often quite another.[5] And it is this fact that gives rise to the following question: Is a distinction between civic and civil right justified, not merely on the basis of etymology but on that of accepted signification as well?

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1. Cf. Any standard dictionary.

2. Cf., e.g., Murray, Sir James A. H., *A New English Dictionary on Historical Principles,* Vol. II, pp. 445, 446, 447.

3. St. Isidore of Seville, *Differentiarum libri duo,* Liber I (*De Differentiis Verborum*) no. 133 (Migne, *Patrologiae Cursus Completus,* Series Latina, Vol. 83, Column 24).

4. We take St. Isidore as our authority, because we can find no other writer that is as explicit on this point as he is.

5. Cf., e.g., St. Thomas, *Summa Theologica,* II-II Q. XCII, Art. I ad 2.

Right in the sense of "law"[6] raises no particular problem, for, when the law of the Church is contrasted with that of the State, the terms "ecclesiastical" and "civil" are used.[7] In fact, that is the usage in all languages.[8] The etymological and the accepted significations in this case are the same.

The difficulty arises when there is question of right in the sense of "just dues" or "the moral faculty to exact these just dues".[9] The two terms "Civic Right" and "Civil Right" are used almost indiscriminately;[10] yet, they should not be. Considering their etymology and the fact that "civil" in contrast with "civic" has the additional meaning of "pertaining to the organization and internal affairs of the body politic, or state",[11] it would seem, that, strictly speaking, *civic*[12] right should connote the right of the *individual* member of a commonwealth, *civil*[13] the right of the *State*.

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6. Cf. C. I, Art. I Definition of Right, "Right as Law".

7. Austin (1832), *Jurisprudence,* (1879) II. xliv. 780: "The word civil has about twelve different meanings; it is applied to all manner of objects which are perfectly disparate. As opposed to criminal, it means all law not criminal. As opposed to ecclesiastical, it means all law not ecclesiastical; as opposed to military, it means all law not military; and so on."—Cobbett (1825) *Rur. Rides* 378: "In defiance of the law, ecclesiastical as well as civil."—Cf. other references in Murray, Sir James A. H., *A New English Dictionary on Historical Principles,* Vol. II, pp. 446, 447, 448.

8. E.g., Latin "jus civile"
French "le droit civil"
German "Civilrecht"
Spanish "derecho civil"
Etc.
} "civil law", as opposed to "ecclesiastical law"

9. Cf. C. I, Art. I Definition of Right, "Right as Just Dues" and "Right as a Moral Faculty".

10. This is due in large part to the fact that "civil" is distinguished from and contrasted with "natural" (Murray, Sir James A. H., *op. cit.,* Vol. II, p. 447) and other words such as "ecclesiastical" etc.,while "*civic*" is used in this manner only very occasionally (Murray, Sir James A. H., *op. cit.,* Vol. II, p. 446).

11. *Ibid.,* Vol. II, p. 446.

12. St. Isidore of Seville (cf. footnote 3 above): "civicum, quod ipsi cives faciunt" (i.e., "cives" in the sense of those who live in the State).

13. St. Isidore of Seville (cf. footnote 3 above): "civile est quod ad civitatem pertinet".

EXTENSION OF THE TERM

But that still leaves us the problem of the extension of the term "Civic Right". For the French, civic rights are those that a citizen possesses not as a human being ("droits civils") but as a member of a particular commonwealth ("droits civiques").[14] On the other hand, Ch. Lahr,[15] J. Guibert[16] and others[17] call these, "political rights" ("droits politiques"); while F. Martel and Ch. Legendre[18] assert that besides civil and political rights there are public rights ("droits publics"), as the rights of assembly, of free speech, of inviolability of possessions, etc. To add to the apparent confusion, Louis Taparelli d'Azeglio,[19] instead of using the term public rights specifically, uses it generically and applies it to civil, political and international rights ("droits civils, politiques et internationals"). And so, when all have had their say, there results a veritable confusion of terms,—sufficient reason for limiting the extension of the term "Civic Right" at least as far as this work on *Civic Right* is concerned.

But what is the reason for discarding the basic assumption upon which the above classifications rest? It is briefly this: In the final analysis, a person can be a member of an organized commonwealth only in as far as he is a human being, while in as far as he is a member of an organized "common wealth"[20] must his rights as a human being be preserved, developed and protected. It follows, then, that the rights of a citizen as a human being and as a member of an organized commonwealth are insep-

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14. Guizot, M., *Dictionnaire Universel des Synonymes,* Paris, 1859-1861, Première Partie, p. 148, n. 271.

15. Lahr, Ch., *Cours de philosophie,* Tome II, p. 172.

16. Guibert, J., *Cours de morale,* Paris, 1912, pp. 360-372, Chapter on "Les Droits du Citoyen".

17. E.g., Ryan, J. A. and Millar, M., in *The State and the Church,* p. 281.

18. Martel, F. and Legendre, Ch., *Droit Usuel,* Paris, 5th ed., pp. 96 ss.

19. Taparelli d'Azeglio, L., *Cours Elémentaire de droit naturel,* Tournai, 1864 (Trans. from the Italian, Naples, 1860, 6th edition), p. 178.

20. All Catholic theologians teach that the end of Society is the "common good" or "welfare".

arable and can and should be comprehended under the term "civic rights",[21] in the sense of all those (and only those) essential rights of the natural law or consequences thereof,[22] that the State defines, develops and protects for the common welfare of those who freely choose to live within its confines or under its protection and to partake of its benefits and concomitant burdens and duties. Or, to put it more simply, "civic rights" signifies all those rights that are commonly known as "the people's rights". In the United States, these rights are: Religious Liberty, Free Speech, Freedom from Search, and certain Judicial and Electoral Rights.[23] They are explicitly guaranteed in the Federal Constitution and are assured to all who live in the United States or under her protection, whether they be citizens strictly so-called or not.[24] However, electoral rights are restricted.[25]

ARTICLE II — CIVIL SOCIETY OR THE STATE

Since it is Civil Society or the State, that defines, develops and protects these rights, it is Civil Society or at least certain basic principles in regard to it, that we must first consider.

SOCIETY IN GENERAL

It is a common fact, disclosed by experience and history alike, that men seek the companionship and cooperation of their fellow-men. They form groups of various sorts, although

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21. "civic", i.e., pertaining to those who make up the State, whether they are citizens strictly so-called or not. St. Thomas, *Summa Theologica*, I-II Q. CV, Art. III ad 2 says: "Dupliciter aliquis dicitur esse civis, uno modo simpliciter, alio modo secundum quid" (i.e., "quicumque civitatem inhabitet").

22. Cf. C. I, Art. III Division of Rights, "According to its Relation to Civil Law".

23. Cf. The various State and Federal Constitutions.

24. In Arkansas, Indiana, Kansas, Michigan, Minnesota, Missouri, North Dakota, Oklahoma, Texas, Wisconsin, for instance, certain non-citizens may vote, while in others certain citizens may not. (Cf. Hall, M., *The Student Voter's Manual*, Westerville, Ohio, 1921).

25. Cf. Chapter VII.

for perhaps equally various reasons. These groups are called "societies".

Now, a society, in the technical sense of the term, is nothing else than a moral and enduring union of two or more persons for the purpose of attaining a common end by the use of cooperative means.[26] It is important to note that the end of Society is the common good[27] and that it is sought by cooperative activity.[28] Hence, men alone can live in Society, since men alone can direct means to an end.[29]

The nature of a society depends on the nature of its end. Thus, a society is "conventional" or "pactitious", if its end is determined by men,[30] e.g., the Knights of Columbus, the Young Men's Christian Association, the Masons, etc.; on the other hand, a society is "natural", if its end is fixed by nature. Now, the Church, the Family and the State are natural societies, since the worship of God, conjugal and parental welfare and the common good of the nation are ends ordained by nature's God. Some authors claim that International Society must also be reckoned as a natural or at least a quasi-natural society, since its end is to regulate the interests common to the various nations.

CIVIL SOCIETY

However, we are directly concerned here only with the State, the "communitas perfecta" of St. Thomas.[31] It is interesting to note how

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26. Cathrein, V., *Philosophia Moralis*, p. 352: "Societas est conjunctio moralis et stabilis plurium in communem aliquem finem suis actibus conspirantium", a definition which he goes on to explain on pp. 352, 353, 354. —Macksey, C., "Society", *The Catholic Encyclopedia*, Vol. XIV, p. 74 b: "The accepted definition of a society is a stable union of a plurality of persons cooperating for a common purpose of benefit to all."—Cf. also Le Buffe, F., *Outlines of Pure Jurisprudence*, p. 126; Coppens C., *A Brief Text-Book of Moral Philosophy*, p. 119; etc.

27. Mere indentity of end or place is thereby excluded. Animals (and even men at times) form "gregarious" groups.

28. Mere identity of means or independent effort is thereby excluded.

29. In virtue of reason, which brutes have not. Their direction comes from instinct.

30. In general, societies, that are commercial, benevolent, literary, athletic, scientific or the like, are "conventional".

Cicero[32] and Augustine[33] furnished Thomas with his now classic definition, that the State is a "coetus multitudinis juris consensu, et utilitatis communione sociatus".[34] It is equally interesting to note how most of our modern definitions of the State[35] also are modelled on this one. The following is typical: "The State is a perfect and self-sufficing society, consisting of many families, united under a common ruler, for the attainment of the complete welfare and life of the community."[36]

ORIGIN OF CIVIL SOCIETY

However important the definition of the State may be, the question of the origin of Civil Society and of the authority that it wields is of far more reaching consequences. On the true solution of this question, hinge Christian social and political science and its answer to the problems, social and political, of the present day.

In regard to the origin of the State, St. Thomas teaches that it is ordained by nature's God, inasmuch as man is by nature a social or politic animal.[37] Now, this is a fact, that is testified to

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31. St. Thomas, *Summa Theologica,* I-II Q. XC, Art. III ad 3.

32. Cicero, *De Republica,* Liber I Caput 25: "Populus autem non omnis hominum coetus quoquo modo congregatus, sed coetus multitudinis juris consensu et utilitatis communione sociatus."

33. St. Augustine, *De Civitate Dei,* Liber II Caput 21: "Populum autem non omnem coetum multitudinis, sed coetum juris consensu et utilitatis communione sociatum esse determinat." (Cf. Migne, *Patrologiae Cursus Completus,* Series Latina, Vol. 41, Column 67).

34. St. Thomas, *Summa Theologica,* I-II Q. CV, Art. II c.

35. For other meanings of the word "State", cf., e.g., Hadow, W. H., *Citizenship,* Oxford, 1923, pp. 70-71; Garner, J. W., *Political Science and Government,* New York, 1928, pp. 46-61.

36. Cronin, M., *The Science of Ethics,* Vol. II (1917), p. 461.

37. St. Thomas, *Summa Theologica,* I Q. XCVI, Art. IV; II-II Q. CIX, Art. III ad 1; Q. CXIV, Art. II ad 1; Q. CXXIX, Art. VI ad 1; III Q. LXV, Art. I; *De Regimine Principum,* Liber I, Caput I; *De Veritate Catholicae Fidei Contra Gentiles,* L. III, C. LXXXV—Suarez, F., *De Legibus,* Liber III, Caput I, n. 3—Leo XIII, "Immortale Dei"—Aristotle, *Politica,* I. 2 (Ross)—Liberatore, M., *Institutiones Philosophicae,* 3 Vol., Romae, 1864, Vol. III, pp. 239-242—Cathrein, V., *Philosophia Moralis,* pp. 382 sq.—Le Buffe, F., *Outlines of Pure Jurisprudence,* pp. 134 ff.—Coppens, C.,

also by experience and history, for man (as we know him) has not only natural *need* but also natural *fitness* and *inclination* to live in Society.[38] The Angelic Doctor observes,[39] that man unlike other animals is unendowed with those adjuncts of nature necessary for food, shelter and defense, such as wild vegetation, coverings of skin, speed in flight, etc. But in place of these, he has reason, by which he can prepare all these things with his hands. However, the individual man alone cannot adequately prepare all these things. True, he can exist, but he cannot achieve through individual effort alone that fullness and roundness of existence, which his nature craves. Hence, he lives in Society not physically impelled thereto (as Evolutionists and others would have us believe), but induced by the realization that the fullness of his nature can be satisfied only when and where "different men may spend their time in inquiring into different things, one in medicine, another in this and another in that."[40]

Nor is man impelled to live in Society merely by natural need or want. Natural fitness also, e.g., his inestimable gifts of speech and hearing, argue conclusively that he is made for Society. This, the Angelic Doctor[41] and still more emphatically the Stagirite[42] set forth, as positive proof of man's social nature. Aristotle remarks: "Nature, as we often say, makes nothing in vain, and man is the only animal whom she has endowed with the gift of speech....the power of speech is intended to set forth the expedient and inexpedient, and therefore likewise the just and the

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A Brief Text-Book of Moral Philosophy, pp. 121-122—Blackstone, W., *Commentaries on the Laws of England*, Vol. I, Introd., Sec. 2, p. 42.

38. Burlamaqui, J., *The Principles of Natural and Politic Law*, Vol. I, Pt. II, Ch. IV, Sect. XIV: "Thus everything invites us to the state of society; want renders it necessary to us, inclination makes it a pleasure, and the dispositions we naturally have for it, are a sufficient indication of its being really intended by our Creator."—And many others advance the same argument.

39. St. Thomas, *De Regimine Principum*, Liber I, Caput I.

40. *Ibid.*, Liber I, Caput I.

41. *Ibid.*, Liber I, Caput I.

42. Aristotle, *Politica*, I. 2 (Ross).

unjust." But why are men so endowed by nature, if they are not to live with others, not to live in Society? It is true that animals can express their passions to one another by inarticulate sound, but sound is not speech; nor would it be of any avail for animals to be so endowed, since instinct is already their sole and sufficient guide and common to all.[43]

Closely allied to natural fitness is natural inclination, a point which may also be argued in favor of the thesis of man's social nature. Daily experience testifies to the fact that man abhors solitude, that he desires the company of others, to whom he may make known his joys and his sorrows, and with whom he may in turn weep or laugh, console, reprimand, inspire,—in short, enjoy the fullness of human intercourse by manifesting, developing and helping others to develop the richness of their common human nature. So strong, indeed, is man's natural inclination to live with others, that St. Thomas[44] is impelled to say that he who leads a life of solitude is either bestial or above men. Or, as Aristotle[45] puts it, a solitaire is either "a beast or a god."

But, it may be said that all this proves only man's social nature and not necessarily his natural desire to be a member of a commonwealth. That is true; yet internal and external experience alike reveal the fact that man tends towards the good by nature.[46] Now, what is Civil Society, if not such a good? Conjugal society, parental society, professional society, in short all other societies, have as object particular goods. However, it is Civil Society that is, in point of fact, "conjectatrix principalissimi boni inter omnia bona humana"[47] inasmuch as it protects and develops all the particular goods necessary to nature by promoting the common good. Hence, it follows, if man naturally

43. St. Thomas, *De Regimine Principum*, Liber I, Caput I.

44. St. Thomas, *Summa Theologica*, II-II Q. CLXXXVIII, Art. VIII ad 5.

45. Aristotle, *Politica*, I. 2 (Ross): "But he who is unable to live in society; or who has no need because he is sufficient for himself, must be either a beast or a god."

46. St. Thomas, *Summa Theologica*, II-II Q. XXXIV, Art. V.

47. St. Thomas, *In Ium Polit.*, lectio I.

wills the good, he should will above all that which surpasses all private good, namely, the common good.[48] It is for this reason that St. Thomas contends that "Homo est naturaliter civile animal"[49] and that "in omnibus hominibus inest quidem naturalis impetus ad communitatem civitatis sicut et ad virtutes."[50]

NECESSITY OF AUTHORITY

Civil Society is ordained by nature's God. What, then, can be said of civil authority? It may be argued, we believe, that if authority is necessary to Society, then authority like man's social nature is of God.[51] But is authority necessary to Society? That it is most necessary, indeed essential, experience, history and philosophy[52] alike demonstrate. As St. Thomas[53] asserts: Authority is indispensable in everything that is ordered to an end. Thus, man is governed by his soul, of which the irascible and concupiscible parts in turn are governed by reason; the wife and the family by the father; the heavenly bodies by immutable physical laws set by nature's God; etc.; etc. To reach an end, means must be properly chosen and directed to that end. Now, in a multitude, where there is diversity of human endeavors and pursuits, where there is the fickleness and inconstancy of human nature and at times the lure of personal advantage, there is need of some one to direct, to point out the way and to oblige men to follow it. Without authority, there will be chaos and in the end total dissolution, for every individual will seek his own personal good or the common good by adverse means. Or, to put

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48. St. Thomas, *Summa Theologica,* Q. CLII, Art. IV ad 3: "...bonum commune potius est bono privato, si sit ejusdem generis."

49. St. Thomas, *In Ium Polit.,* lectio I.

50. *Ibid.*—Cf. also Schwalm, S., *Leçons de Philosophie Sociale,* 2 Tomes, Paris, 1911, Tome II, pp. 440 ss.

51. Cf. Subsequent paragraph.

52. St. Thomas, *Summa Theologica,* I Q. XCVI, Art. IV; *De Regimine Principum,* Liber I, Caput I—Suarez, F., *De Legibus,* Liber III, Caput I nn. 4 et 5; *Defensio Fidei,* Liber III, Caput I, n. 5—Bellarmine, S. R., *De Membris Ecclesiae Militantis,* Liber III, Caput V (Cf. Bibliography)—Leo XIII, "Immortale Dei"—Cathrein, V., *Philosophia Moralis,* pp. 384 sq.—Le Buffe, F., *Outlines of Pure Jurisprudence,* pp. 138-140—And others.

53. St. Thomas, *De Regimine Principum,* Liber I, Caput III.

it in the words of Solomon, that keen observer of human nature: "Where there is no governor, the people shall fall."[54] And, although Solomon is not listed as a prophet, he enunciated a dictum that history has yet to prove false, and, in fact, will never demonstrate to be wrong,—for just as a ship without a navigator will never reach a harbor, so a State without a directing power will never attain the common good. In conclusion, we quote St. Thomas: "Oportet igitur esse in omni multitudine aliquod regitivum."[55]

CIVIL AUTHORITY COMES FROM GOD

As was argued above, if Civil Society is natural to man and if it absolutely needs authority to endure, then its authority is from God. We believe that this reasoning is valid, for he, who wills the end, must necessarily will the means without which that end would be unattainable. Hence, God the Author of Nature in making men social conferred on them socially united that indispensable requisite of all Society, namely, authority. In this regard, St. Paul's contention: "...there is no power but from God",[56] is, so to say, classical. The Angelic Doctor reiterates the same thought.[57] Leo XIII, in more modern times, paraphrases and sums up the doctrine thus: "Quoniam vero non potest societas ulla consistere, nisi si aliquis omnibus praesit, efficaci similique movens singulos ad commune propositum impulsione, efficitur, civili hominum communitati necessariam esse auctoritatem, qua regatur: quae, non secus ac societas, a natura proptereaque a Deo ipso oriatur auctore."[58]

Another argument, formulated by Suarez[59] and at the present day advanced by Cathrein,[60] is to this effect, namely, that the State has certain rights, which are not in the power of man to confer, such as the right of capital punishment, the right of war,

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54. *The Holy Bible* (Douay Version), Proverbs, XI, 14.
55. St. Thomas, *De Regimine Principum,* Liber I, Caput I.
56. *The Holy Bible* (Douay Version), Romans, XIII, 1.
57. Cf. St. Thomas, e.g., *Summa Theologica,* II-II Q. CIV, Art. I.
58. Leo XIII, "Immortale Dei".
59. Suarez, F., *De Legibus,* Liber III, Caput III, n. 3.
60. Cathrein, V., *Philosophia Moralis,* p. 388.

the right of retribution, etc. These rights cannot come from man. They can come only from God, the Author of Life. Therefore, since the State possesses these rights,[61] the State must have its authority from God.

Suarez,[62] Rickaby[63] and others believe that the moral obligation to obey the just laws of the State also proves the divine origin of civil authority.

ORIGIN OF AUTHORITY IN THE CONCRETE

Now, if God confers authority on the State, how does He confer it, what channels does He make use of? It is on this question of the proximate origin of authority, that Catholic theologians are divided. If we disregard all theories, which might be called, for want of a better name, "reconciliation or compromise theories", there are only two schools among Catholic sociologists of the present day on this important and much-discussed question.[64] One, the "consent theory",[65] born in the middle ages and redolent of Scholastic theology as expounded in the Dominican and Jesuit lecture halls,[66] finds its chief exponents in former Cardinal Billot[67] and the American

61. Cf. Chapter VI on "Judicial Rights".

62. Suarez, F., *De Legibus,* Liber III, Caput III, n. 3.

63. Rickaby, J., *Moral Philosophy,* pp. 317 ff.

64. Cf., e.g., *Studies* (Dublin), 1918-1922 and *The Irish Theological Quarterly* (Dublin), October 1920, January, April, July, October 1921.

65. This theory should not be confused with the Consent Theory of Rousseau, viz., that the consent of the people is the *ultimate* source of authority. According to our theory, *God* is the *ultimate* source, human consent but the proximate. For a more detailed comparison of the two "consent theories", cf., Liberatore, M., *Institutiones Philosophicae,* Vol. III, pp. 275-276; cf. also Yves de la Brière, "The Origin of Political Power", *The Modern Schoolman,* St. Louis, 12::3 (March 1935), pp. 51-55.

66. St. Thomas, *Summa Theologica,* II-II Q. XLII, Art. II; I-II Q. XC, Art. III—Suarez, F., *De Legibus,* Liber III, Cap. II, III, IV; *De Opere Sex Dierum,* Liber V, Caput VII; *Defensio Fidei,* Liber III, Cap. II, III—Bellarmine, S. R., *De Membris Ecclesiae Militantis,* Liber III, Caput VI; *De Summo Pontifice,* Liber I, Caput III.

67. Billot, L., "The Moral Origin of Civil Authority" in *The State and the Church* by Ryan, J. A. and Millar, M., pp. 62-68 (Free translation of Propositions III and IV, sec. 1, quest. 12, Chapter 3, *De Ecclesia Christi*).

Catholic School of Sociology headed by Macksey,[68] Millar,[69] Ryan[70] and others. The other, the "prior right theory", conceived in germ already in the 16th Century, but given final definite shape and weight only in the middle of the 19th by Taparelli,[71] is espoused by Italian Catholic Schools and by certain European professors trained therein. The former theory alone, however, seems to be tenable, as the following considerations will conclusively demonstrate.

To solve the difficulty, one must clearly distinguish between the historic causes that gave rise to the State and the juridic title or foundation on which this civic bond of unity is based, for historical origin is one thing while juridical title is quite another. Granted that patriarchal expansion, feudal ownership or conquest gave rise to the State, none of these can adequately explain the juridical title to the rights of sovereignty. The constitutional consent of the people, however, can account for it,—and why? Men are impelled by nature to live in Society. Once associated, the duty devolves on them to procure their common welfare. But God never imposes a natural duty on any one, whether he be a moral or a physical person, without giving him *ipso facto* a

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68. Macksey, C., "Sovereignty and Consent" in *The State and the Church* by Ryan, J. A. and Millar, M., pp. 68-99.

69. Millar, M., "The History and Development of the Democratic Theory of Government in Christian Tradition" in *The State and the Church* by Ryan, J. A. and Millar, M., pp. 99-145.

70. Ryan, J. A., "Catholic Doctrine on the Right of Self Government", The Paulist Press, New York.

71. Taparelli, L., *Essai Théorique de Droit Naturel*, 2 Tomes, Tournai, 1875 (First Ed. 1851), (Trans. from the Italian, Palermo, 1840-1843), Livre II, Chapitre IX.—Macksey, C., "Society", *The Catholic Encyclopedia*, Vol. XIV, p. 77 a: "The Taparelli School makes the primitive determinant out of an existing prior right of another character, which passes naturally into this power. Primitively this is parental supremacy grown to patriarchal dimensions and resulting at the last in supreme civil power. Secondarily, it may arise from other rights, showing natural aptitude preferentially in one subject or another, as that of feudal ownership of the territory of the community, capacity to extricate order out of chaos in moments of civic confusion, military ability, and success in case of just conquest, and, finally, in remote instances by the consent of the governed."

right to the means,[72] which in this case is either sovereignty in the people themselves or the right to delegate it to an individual or a group of individuals, as the people may see fit. Hence, St. Thomas says, when speaking of ordering something to the common good (which is the proper end of Society), that this belongs "...ad totam multitudinem, vel pertinet ad personam publicam, quae totius multitudinis curam habet; quia *et in omnibus aliis ordinare in finem est ejus, cujus est proprius ille finis*".[73] St. Thomas further remarks, in the same article, that this "personam publicam" is none other than the "alicujus gerentis vicem totius multitudinis". And this seems to be no more than logical. After all, a patriarch, a territorial landlord or a conqueror has no natural title to civil sovereignty; his so-called "prior right" is based on domestic authority or on commutative justice, and imposes on him the duty to promote the welfare of the family or of the individual but not that of the community, the common weal. To him, upon whom the duty is imposed, is given the right to the means to fulfill that duty. Hence, the contention, made in this thesis, that sovereignty lies originally with the people, the sovereign's title being derivative only, dependent on the consent of the governed, the body politic, whether this consent be explicit or implicit, spontaneous or only by degrees, free or coerced. This is the meaning of the expression in *The Declaration of Independence,* "...governments derive their just powers from the consent of the governed"; this is, moreover, what Cicero, St. Augustine and the Angelic Doctor enunciated centuries previous: "...populum determinant sapientes, non omnem coetum, sed coetum juris consensu et utilitatis communione sociatum."[74]

In view of the fact, however, that this question is still mooted and that it is the subject of longer and finer subtleties than the limits of this dissertation permit, the following quotations, confirmative of the position here taken, are subjoined:—Charles

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72. "Natura non deficit in necessariis" is a basic principle of all scholastic philosophy and theology.

73. St. Thomas, *Summa Theologica,* I-II Q. XC, Art. III (The italics are [ours).

74. *Ibid.,* II-II Q. XLII, Art. II.

Périn[75] says: "Telle est la doctrine des théologiens les plus autorisés."[76] Ferd. J. Moulart[77] is more explicit in maintaining that: "Cette doctrine a en sa faveur le sentiment commun des théologiens et des canonistes, dont on peut voir une longue énumération dans Suarez et dans Balmès. Elle compte saint Thomas parmi ses défenseurs. Plusieurs saint Pères l'ont formellement enseignée."[78] D. Raphael Rodriguez de Cepeda[79] gives a like enumeration, concluding with the remark that "C'est celle qu'ont embrassée tous les Scolastiques."[80] Alfred O'Rahilly goes even more diligently and painstakingly into the question and examines over two hundred Catholic theologians and philosophers of note from the 13th Century to the present day,[81]—only to reach a similar conclusion.[82]

LEGITIMATE REBELLION NOT SEDITION

It might be remarked here, that it matters not what form this authority may take, be it monarchy, aristocracy or democracy. Fundamentally, none of these is to be preferred;[83] what is best for the particular people, clime

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75. Périn, C., *Les Lois de la société chrétienne,* 2 Tomes, Paris, 1875, Tome I, pp. 198-199.

76. *Ibid.,* Tome I, p. 199.

77. Moulart, F., *L'Eglise et l'Etat ou Les Deux Puissances,* Louvain, 1879, pp. 73-81.

78. *Ibid.,* p. 77.

79. Rodriguez de Cepeda, R., *Eléments de droit naturel* (Trans. from the 2nd edition of the Spanish by Aug. Onclair, Paris, 1890), pp. 410-421.

80. *Ibid.,* p. 414.

81. Cf. *Studies,* 10::37 (March 1921), pp. 39-57.

82. Besides the books quoted above, the reader might find useful: Mancel, P., *Du Pouvoir et de la liberté,* Paris, 1853; Montagne, *Etudes sur l'origine de la société,* 3 Tomes, Paris, 1905; Devès, M., *Le Droit et la souveraineté populaire,* Paris, 1905; Quilliet, H., *De potestatis civilis origine theoria catholica,* Lille, 1893; Chenon, E., *Théorie catholique de la souveraineté nationale,* Paris, 1898; Boucaud, Ch., *L'Epanouissement social des droits de l'homme,* Paris, 1907.

83. Leo XIII, "Redditae Mihi": "Patet ex illis catholicam Ecclesiam, cujus divina missio tempora et loca omnia complectitur, nihil in sua constitutione et doctrinis habere quod ab aliqua abhorreat reipublicae forma, quum singulae optimum civitatis statum parare ac tueri possint, si juste

and time, is the polity to be instituted and sustained. As long as that polity is conducive to the common good, it may not be subverted unless constitutionally so provided for. Moreover, that is the Catholic doctrine on this point.[84]

But, in the event of unjust rule can resistance ever be justified, i.e., resistance to such an extent as to use force against the present incumbent of authority and the existing polity of the State? The answer is not only difficult but also dangerous if not rightly and strictly interpreted; yet theologians and statesmen alike are in full accord in laying down the *broad principles* upon which this rebellion may be not only justified but also desired. Hence, in enunciating the four following principles upon which rebellion may be justified, the writer sincerely believes that he is but reiterating the doctrine of St. Thomas[85] and Leo XIII[86] on the one hand and of Alexander Hamilton[87] and the signers

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ac prudenter adhibeantur. Scilicet Ecclesia assurgens supra mutabiles imperii formas ac contentiones et studia partium, spectat imprimis religionis incrementa et animarum salutem.''—St. Thomas seems to favor a monarchy (Cf. *Summa Theologica,* I-II Q. CV, Art. I and *De Regimine Principum,* Liber I, Caput II), while Aristotle seems to prefer a moderate republic (Cf. *Politica,* IV.9, 11, 12—Ross), democracy meaning for him but mob rule (Cf. *Politica,* III.7—Ross). All this, however, is but idealistic speculation; under given conditions, we are sure, Aristotle himself would favor a monarchy with Pericles as king (Cf. *Politica,* III.12—Ross), just as St. Thomas says in his *Summa Theologica,* I-II Q. CV, Art. I ad 2: ''...regnum est optimum regimen populi, *si non corrumpatur*'', etc.—For further development of St. Thomas' ideas on this point, cf. Feugueray, H., *Essai sur les doctrines politiques de Saint Thomas d'Aquin,* Paris, 1857, pp. 99-127 (especially p. 107).

84. *The Holy Bible* (Douay Version), Romans, XIII, 2: ''Therefore he that resisteth the power, resisteth the ordinance of God.''—St. Thomas, *Summa Theologica,* II-II Q. XLII, Art. II c.—Leo XIII, ''Quod Apostolici'' and ''Sapientiae Christianae''.

85. St. Thomas, *Summa Theologica,* II-II Q. XLII, Art. II ad 3; *De Regimine Principum,* Liber I, Caput 6.

86. Leo XIII, ''Quod Apostolici''.

87. Alexander Hamilton, ''Full Vindication of the Measures of Congress from the Calumnies of Their Enemies'' (December 15, 1774): ''To render it agreeable to good policy, three things are requisite. First, that the necessity of the times requires it; secondly, that it be not the probable source

of *The Declaration of Independence*[88] on the other:

"Resistance is lawful:—(1) When a government has become substantially and habitually tyrannical, and that is when it has lost sight of the common good, and pursues its own selfish objects to the manifest detriment of its subjects, especially where their religious interests are concerned. (2) When all legal and pacific means have been tried in vain to recall the ruler to a sense of duty. (3) When there is a reasonable probability that resistance will be successful, and not entail greater evils than it seeks to remove. (4) When the judgment formed as to the badness of the government, and the prudence of resistance thereto, is not the opinion only of private persons or a mere party: but is that of the larger and better portion of the people,[89] so that it may be morally considered as the judgment of the community as a whole."[90]

Such are the principles upon which rebellion to authority, it would seem, may be justified, principles which consider alike the private as well as the common good; to act otherwise were to lose sight of both and, therefore, also of the very "raison d'être" of Society itself.[91] In conclusion, we quote an eminent present day authority on this point: "And, therefore, the people have a right

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of greater evils than those it pretends to remedy; and lastly, that it have a probability of success." Cf. *The Works of Alexander Hamilton,* Edited by H. Lodge, New York and London, 9 Vols., 1885-1886, Vol. I, p. 13.

88. *The Declaration of Independence*: "...whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for any light and transient causes;" etc.

89. By what is called the "major et sanior pars populi".

90. *Dublin Review,* April 1865, p. 292. Also quoted by Rickaby, J., in *Moral Philosophy,* p. 341.—The article in the *Dublin Review* is entitled "The Principles of '89—Political Science and the Source of Power", pp. 279-302.

91. Cf. also Mignault, A-M., *La Résistance aux Lois Injustes et la Doctrine Catholique,* Montreal, 1920, especially p. 129.

to resist and defend themselves against injustice [tyranny] and to take all the necessary means of defense, even the dethronement of the ruler.''[92] In short, such an act, far from being an act of aggression, would be but another form of self-defense.

ARTICLE III — CIVIC RIGHT IN THE UNITED STATES[93]

ST. THOMAS AND AMERICAN INDEPENDENCE

The United States Government owes its existence to just such an act of self-defense,[94] for *The Declaration of Independence,* which gave rise to it, was but the proclamation of freedom from tyranny and of the right to a just rule.[95]

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92. Cronin, M., *The Science of Ethics,* Vol. II (1922), p. 541.

93. Dr. James J. Walsh, in his recent work entitled *Education of the Founding Fathers of the Republic,* New York, 1935, says: ''Scholasticism has always been looked upon as a thing of the distant past, but as a matter of fact the men who organized our government of the people, by the people and for the people in its present form, were most of them trained mentally in accordance with this medieval mode of thought and teaching.'' (Preface, p. x)—Yet, just what was this scholastic influence on political philosophy and political institutions here in America? Besides the works cited elsewhere in this dissertation, the following will prove enlightening in this regard: Millar, M., ''The Origin of Sound Democratic Principles in Catholic Tradition'', *Thought,* New York, 2::4 (March 1928), pp. 594-620; reprinted in *The Catholic Historical Review,* Washington, New Series, Vol. VIII, No. I (April 1928), pp. 104-127—Bourke, V., ''The Political Philosophy of St. Augustine'', *Proceedings of the Seventh Annual Meeting of The American Catholic Philosophical Association,* Held at St. Louis University, St. Louis, Missouri, December 29 and 30, 1931, pp. 45-55—O'Connor, D., ''The Political Theory of the Carolingian Renaissance'', *op. cit.,* pp. 55-75—Farrell, W., ''Natural Foundations of the Political Philosophy of St. Thomas'', *op. cit.,* pp. 75-85—Wright, H., ''The 'De Potestate Civili' of Vitoria'', *op. cit.,* pp. 85-96—Wallace, T., ''The Political Philosophy of Suarez'', *op. cit.,* pp. 96-105—Coulson, H., ''The Political Philosophy of Montesquieu'', *op. cit.,* pp. 105-123—Riedl, J., ''Trends in Modern Political Theory'', *op. cit.,* pp. 123-137—Pitamic, L., ''The Fundamental Rights of Man as Individual and as Citizen'', *op. cit.,* pp. 137-148—Donovan, J., ''Brownson, The Philosophical Expounder of the Constitution'', *op. cit.,*

Written by one imbued with Whig philosophy (concerning which Lord Acton says: "...the earliest exposition of the Whig theory of the revolution, is taken from the works of St. Thomas Aquinas..."),[96] *The Declaration of Independence* is, in truth, a synthesis of Thomistic Principles,[97] justifying alike America's juridic title to sovereignty and Americans' claim to life, liberty and the pursuit of happiness.

In its very first paragraph this grand document declares its faith in Nature and Nature's God.[98] Then, with admirable conviction in the uprightness of its cause, it proclaims in unmistakable terms the principles and the reasons that impel it to take this momentous step, leaving it to the judgment of nations[99] to accuse it of wrong.

The fundamental truth that it lays down as a premise of its thesis, is "that all men are created equal".[100] And by this is meant not an equality of initial gifts[101] (as is clear from its context), but rather a specific and legal equality,[102]—an equality

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pp. 148-165—Millar, M., "The French Theory of the Institution, Suarez, and the American Constitution", *op. cit.*, pp. 165-181.

94. St Thomas, *Summa Theologica*, II-II Q. LXIV, Art. VII.

95. Millar, M., in *The State and the Church*, by Ryan, J. A. and Millar, M., p. 174, says: "If from all this we turn to the Declaration of Independence...it will appear clearly that it is in truth not an assertion of 'new principles or new arguments' but a declaration of principles rooted in the very foundation of Christian civilization. In Jefferson's splendid synthesis, they stand out to the world not merely as the legimate ground for our separation from England, where they were refused recognition, but as the true Medieval and Christian norm of all just government."

96. Cf. Acton, John, *The History of Freedom and other essays*, London, 1907, p. 37; cf. also *America*, 20::16 (January 25, 1919), p. 387.

97. The sequel of this article will fully disclose the saneness of this contention.

98. Cf. *The Declaration of Independence.*

99. *Ibid.*

100. *Ibid.*

101. Cf. Le Buffe, F., *Outlines of Pure Jurisprudence*, pp. 121-126—Ryan, J. A., *Distributive Justice*, New York, 1925, p. 243: "Although men are equal as moral entities, as human persons, they are unequal in desires, capacities, and powers."

102. Cf. Le Buffe, F., *Outlines of Pure Jurisprudence*, pp. 121-126—St.

inasmuch as all men have a common nature, are directed to a common end, and partake equally of rights and duties consequent of this nature and requisite to this end,—an equality also which makes them all equal before the law in the legal protection of those rights which are a part of man's nature and a means to his end.

Having set forth this postulate on the equality of men, the Declaration goes on to say that men "are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness".[103] These words are admirable, indeed, coming from a mere statesman, for, according to sound Scholastic doctrine,[104] inalienable rights exist, rights so essential to man's nature and its requirements, that they cannot be renounced or transferred without doing violence to this nature. Among these inalienable rights must be reckoned life, liberty and the pursuit of happiness, for these rights are born not of any mutual covenant or grant of the State but are ingrafted equally in every human being by nature's God.[105] This doctrine of the Schoolmen is briefly outlined in the following citations from St. Thomas:

I. LIFE: "...vita naturalis pertinet ad substantiam hominis, et ideo non recipit magis et minus."—*Summa Theologica,* I-II Q. CXII, Art. IV ad 3.

Thomas, *Summa Theologica*: (a) Concerning "specific equality": "...in quibus tamen secundum ea quae ad naturam corporis pertinent, homo homini obedire non tenetur, sed solum Deo; quia *omnes homines natura sunt pares.*" (II-II Q. CIV, Art. V c.—The italics are ours.)—(b) Concerning "legal equality": "Sic ergo patet quod personarum acceptio opponitur justitiae distributivae in hoc quod praeter proportionem agitur." (II-II Q. LXIII, Art. I).

103. Cf. *The Declaration of Independence.*

104. Thus, for instance, the American Hierarchy in their National Pastoral for 1926 expressly subscribed to this doctrine: "With the Signers, we hold certain truths 'to be self-evident'. We agree that 'all men'...'are endowed by their Creator with certain unalienable rights: that among these are Life, Liberty and the pursuit of Happiness'" etc. (Cf. *The Ecclesiastical Review,* 76::6, p. 619, for June 1927).

105. Guilday, P., *The National Pastorals of the American Hierarchy 1792-1919*, Washington, 1923, p. 305 (Pastoral for 1919).

"...nullum occidere licet...debemus amare naturam quam Deus fecit, quae per occisionem corrumpitur." —*Summa Theologica,* II-II Q. LXI, Art. VI.

II. LIBERTY: "Unde ubicumque est intellectus, est liberum arbitrium."—*Summa Theologica,* I Q. LIX, Art.III c.

"Homo est dominus sui actus."—*Summa Theologica,* I-II Q. VI, Art. II ad 2.

"...libertas, secundum quod in ea consideratur quaedam remotio coactionis, non suscipit magis et minus."—*Summa Theologica,* I Q. LIX, Art. III ad 3. cf. also among many other references: *Summa Theologica,* II-II Q. LXIV, Art. V ad 3, and II-II Q. CIV, Art. V.

III. PURSUIT OF HAPPINESS: "Non enim ad liberum arbitrium pertinet quod volumus esse felices, sed ad naturalem instinctum."—*Summa Theologica,* I Q. XIX, Art. X c.

Nor must happiness here be taken in the Utilitarian sense ascribed to it by Bentham, but rather in the sense of "ultimate happiness", as expressly stated in Madison's letter to Monroe (Oct. 5, 1786).[106]

Although *The Declaration of Independence* insists that these rights come from nature, it asserts: "...that to secure these rights, Governments are instituted among Men."[107] Now, these words should not be misconstrued, for that which follows in the Declaration makes it clear that the sole purpose of the State is not simply protection against the encroachments of others, as Kant, Spencer, Puffendorf and others maintain, but something more.[108] As St. Thomas[109] conceives it, the purpose and "raison

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106. Cf. Madison, J., *Letters and other Writings,* 4 Vols., Phila., 1865, Vol. I, pp. 250-251.

107. Cf. *The Declaration of Independence.*

108. Brosnahan, T., *Digests of Lectures on Ethics,* Baltimore, 1913, p. 113: "The theory of Kant, Spencer and others who confine the purpose of the State to securing rights is—except as a protest against State paternalism—untenable."

109. Cathrein, V., *Philosophia Moralis,* p. 410 (1911 edition—not in 1935

d'être'' of the State is the common good, and to this end pertains not merely the securing of these inalienable rights, but also the general promotion of human welfare, namely, the securing of a ''necessariorum ad bene vivendum...sufficiens copia.''[110]

The Declaration then contends that governments derive ''their just powers from the consent of the governed''. This, however, should not be construed as the contractualist theory of Rousseau, but rather as the consent theory of the Scholastics.[111] St. Thomas states (*Summa Theologica,* II-II Q. XLII, Art. II c.): ''Dicit autem Augustinus, 'quod populum determinant sapientes, non omnem coetum multitudinis, sed coetum juris consensu, et utilitatis communione sociatum' ''.[112] That such was the Christian import of the Declaration is borne out by indisputable historical evidence.[113]

Having laid down these basic principles, the document continues in unmistakably Thomistic terms to justify the resistance of the Colonists. The following suggestive parallel will bear out this contention:

The Declaration of Independence	*St. Thomas*
''That whenever any Form of Government becomes destructive of these ends it is the right of the people to alter or abolish it,	''...si ad jus multitudinis alicujus pertineat sibi providere de rege, non injuste ab eadem rex institutus potest destrui vel refraenari ejus potestas, si potestate regia tyrannice abutatur.

edition): ''S. Thomas ergo longe abest ab opinione eorum, qui finem civitatis solam securitatem et pacem contendunt.''

110. St. Thomas, *De Regimine Principum,* Liber I, Caput 15.—Cf. also Leo XIII, ''Immortale Dei''.

111. Cf. above, Art. II Civil Society or the State, ''Origin of Authority in the concrete''.

112. Bryce, J., *Studies in History and Jurisprudence,* New York, 1901, Chapter X, p. 529: ''St. Thomas Aquinas recognizes sovereignty as originally and primarily vested in the people, hardly less explicitly than does the Declaration of Independence.''—Cf. also Ryan, J. A. and Millar, M., *The State and the Church,* p. 98 in particular.

113. For a detailed defense of this position, cf. Ryan and Millar, *op. cit.,* pp. 62-194.

Nec putanda est talis multitudo infideliter agere tyrannum destituens, etiam si eidem in perpetuo se ante subjecerat; quia hoc ipse meruit in multitudinis regimine se non fideliter gerens ut exigit regis officium, quod ei pactum a subditis non reservetur." (*De Regimine Principum,* Liber I, Caput 6)

"and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

"...ad gubernatoris officium pertinebit non solum, ut rem in se conservet illaesam [Safety], sed quod ulterius ad finem perducat." [Happiness, i.e., Ultimate Happiness] (*De Regimine Principum,* Liber I, Caput 14—cf. also Liber I, Cap. 13 and 15)

"Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes;

"Consilii rectitudo pertinet ad donum consilii et ad virtutem prudentiae; licet diversimodo... et ideo praecipitatio utrique contrariatur." (*Summa Theologica,* II-II Q. LIII, Art. III ad 1—cf. Corpus articuli for a fuller explanation and a closer parallelism)

"and accordingly all experience hath shown, that mankind are more disposed to suffer, while evils are sufferable than to right themselves by abolishing the forms to which they are accustomed.

"Et quidem si non fuerit excessus tyrannidis, utilius est remissam tyrannidem tolerare ad tempus....Sic enim in tyrannide solet contingere, ut posterior gravior fiat quam praecedens." (*De Regimine Principum,* Liber I, Caput 6)

"But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security."

"Inter omnes possunt justissime movere seditionem virtuosi excellentes alios secundum virtutem; si vero ista concurrerent quod haberent justam causam et potentiam et non esset detrimentum boni communis moverent seditionem rationabiliter, et *peccarent si non movcrent.*" (*In Vum Politicorum,* Lectio I — The italics are ours)

"Et si sit intolerabilis excessus tyrannidis, quibusdam visum fuit ut ad fortium virorum virtutem pertineat tyrannum interimere...cujus rei exemplum etiam in veteri testamento habetur....Videtur autem magis contra tyrannorum saevitiam non privata praesumptione aliquorum sed auctoritate publica procedendum" etc. (*De Regimine Principum,* Liber I, Caput 6)

"...regimen tyrannicum non est justum, quia non ordinatur ad bonum commune....Et ideo perturbatio hujus regiminis non habet rationem seditionis; nisi forte quando sic inordinate perturbatur tyranni regimen,quod multitudo subjecta majus detrimentum patitur ex perturbatione consequenti quam ex tyranni regimine. Magis autem

tyrannus seditiosus est'' etc.[114] (*Summa Theologica,* II-II Q. XLII, Art. II ad 3).

Substantiated by many and undeniable facts, the document, then, goes on to prove conclusively that ''The history of the present King of Great Britain is a history of repeated injuries and *usurpations,* all having in direct object the establishment of an *absolute* Tyranny over these States''.[115] Passing over this part, as it is irrelevant to the contention here sustained, the parallel may be continued:

The Declaration of Independence	*St. Thomas*
''In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury....We have reminded them [our British brethren] of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them by the ties of our common kindred to disavow these usurpations, which, would inevitably interrupt our connections and correspondence. They too have been deaf to the voice of justice and consanguinity.	''...in correctione qua subditi corrigunt praelatos, debet modus congruus adhiberi, ut scilicet non cum protervia et duritia, sed cum mansuetudine et reverentia corripiantur.'' (*Summa Theologica,* II-II Q. XXXIII, Art. IV) ''Virtus autem vindicationis consistit in hoc ut homo secundum omnes circumstantias debitam mensuram in vindicando conservet.'' (*Summa Theologica,* II-II Q. CVIII, Art. II ad 3) ''...illi qui sunt nobis magis conjuncti, sunt ex charitate magis diligendi....Et ideo in his quae pertinent ad naturam, plus debemus deligere consanguineos: in his autem quae

114. Cf. Mignault, A-M., *La Résistance aux lois injustes et la doctrine catholique,* p. 124.

115. The italics in both cases are ours.

pertinent ad civilem conversationem plus debemus deligere concives." (*Summa Theologica,* II-II Q. XXVI, Art. VIII)

"We must, therefore, acquiesce in the necessity, which denounces our Separation, and hold them, as we hold the rest of mankind, Enemies in War, in Peace Friends.

"...necessitas non subditur legi." (*Summa Theologica,* I-II Q. XCVI, Art. VI c.)
"Inimici autem sunt nobis contrarii, inquantum sunt inimici: unde hoc debemus in eis odio habere; debet enim nobis displicere quod nobis inimici sunt. Non autem nobis sunt contrarii, inquantum homines sunt, et beatitudinis capaces; et secundum hoc debemus eos deligere." (*Summa Theologica,* II-II Q. XXV, Art. VIII ad 2)

"We, therefore, the Representatives of the United States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by

"...sed auctoritate publica procedendum. Primo quidem si ad jus multitudinis alicujus pertineat sibi providere de rege,[116] non injuste ab eadem rex institutus potest destrui vel refraenari ejus potestas, si pote-

116. James Wilson in his "Speech at the Convention in Pennsylvania" (1775) said: "The government of Britain...was never an arbitrary government: our ancestors were never inconsiderate enough to trust those rights, which God and nature had given them, unreservedly into the hands of their princes. However difficult it may be in other states, to prove an original contract subsisting in any other manner, and on any other conditions, than are naturally and necessarily implied in the very idea of the first institution of the state; it is the easiest thing imaginable, since the revolution of 1688, to prove it in our constitution, and to ascertain some of the material articles, of which it consists....The duties of the king and those of the subject, are plainly reciprocal: they can be violated on neither side, unless they are performed on the other." etc. *Works,* 2 Vols., Chicago, 1896, Vol. II, pp. 557, 565.

Authority of the good People of these Colonies, solemnly publish and declare, that these United Colonies are, and of Right, ought to be Free and Independent States...."

state regia tyrannice abutatur. Nec putanda est talis multitudo infideliter agere tyrannum destituens, etiam si eidem in perpetuo se ante subjecerat." (*De Regimine Principum,* Liber I, Caput 6)[117]

Well did Thomas Jefferson and the framers of *The Declaration of Independence* realize that to stop here were to involve the country in anarchy and to threaten the public peace. In consequence, they laid the foundations of a provisional government. For them, defensive rebellion did not mean anarchy but rather better government.

What more fitting and Christian conclusion could they have put to this great document, than the following: "...and for the support of this Declaration, with a firm reliance on the protection of Divine Providence,[118] we mutually pledge to each other our Lives, our Fortunes and our sacred Honor."—Truly, indeed, as Rev. Moorhouse F. X. Millar, S.J. puts it: "In Jefferson's splendid synthesis they stand out to the world not merely as the legitimate ground for our separation from England...but as the true Mediaeval and Christian norm of all just government."[119] Or,

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117. Cathrein, V., *Philosophia Moralis*:

p. 481: "Scholastici fere omnes docebant licere *toti communitati* contra tyrannum insurgere eumque expellere, si sua potestate in grave damnum reipublicae abutatur (*S. Thom.* 2, 2, q. 42, a. 2 ad 3. *Suarez,* Def. fidei l. 4, c. 4, n. 15. *Banez* O. P., De justitia et jure q. 64, a. 3). Recentiores auctores catholici contra generatim negant populo unguam licere tyranno vi resistere eumque expellere. Provocant ad librum De regimine princ. l. I, c. 6, ad Conc. Const. sess. 15 et Syllabi thes. 63: 'Legitimis principibus oboedientiam detrectare, immo et rebellare licet.' "

p. 481: "Si populo jus competit sibi regem creandi, jus quoque habet eum sua potestate graviter et habitualiter abutentem in casu necessitatis deponendi.

"Ita fere omnes cum auctore libri De regimine princ. L. 1. c. 6—Si enim rex ex parte sua pacto non stat, neque populus ex sua parte eidem stare tenetur."

118. St. Thomas, *De Regimine Principum,* Liber I, Caput 6.

119. Ryan, J. A. and Millar, M., *The State and the Church,* p. 174.

as one of England's illustrious sons, the late G. K. Chesterton, expressed it: "The American Declaration of Independence is in its elements a very Catholic document. Almost alone among the plans of modern institutions, it bases all government on the right of men to justice and all rights of men on the authority of God...it is, compared with most modern philosophies of government, a most papistical document."[120]

THE DECLARATION OF INDEPENDENCE AND CIVIC RIGHT

If such was the philosophy of *The Declaration of Independence,* such should have been the philosophy of the provisional government and the new Constitution that it gave birth to.[121] But, we are concerned here only with *The Declaration of Independence and Civic Right.* What, then, to be more direct and explicit, was the political philosophy of *The Declaration of Independence* in regards to the people's rights? Briefly, it was this: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."[122]

These words of *The Declaration of Independence* are so explicit, that it would be exceedingly difficult to misconstrue them. Man is made not for the State, but rather the State for man. He is endowed by his Creator with rights which no State can grant, rights that are natural, inalienable. And lest these terms should prove to be too general, the Declaration explicitly enumerates these rights: Life, Liberty and the pursuit of Happiness, captions under which each and every one of man's natural rights find at least implicit protection.[123]

Men are not *granted* the right to life; they are *assured* it. After all, the right to life is the most basic, the *sine qua non* of all

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120. Cf. *America,* 37::2 (April 23, 1927), p. 34.

121. Cf. *Constitution of the United States of America*—Robert E. Shortall in *America,* 34::14 (January 16, 1926), p. 332, says: "No provision of the Constitution should violate the principles enunciated in the Declaration of Independence."

122. Cf. *The Declaration of Independence.*

123. Ryan, J. A. and Millar, M., *The State and the Church,* p. 277.

rights. Take it away and there are no rights; grant it and at once there flow a multitude of subsidiary rights. In virtue of this God-given right, men are immune from all arbitrary physical assault, whether this assault have as object and final result to put an end to earthly existence or merely to sap ever so slightly that sacred principle of vitality within them.

Liberty is but a natural consequence of life. Grant life and you must grant that liberty without which there can be no complete realization and development of the human composite. Life with all its faculties and latent possibilities craves and demands liberty of physical movement, liberty of intellectual development and expression, liberty of soul-cultivation. These broad and comprehensive lines embrace all man's natural endowments. If man has no liberty, he cannot develop these faculties and latent possibilities given him at birth by his Creator, by Whom nothing indeed has been made in vain.[124] It is this thought of the Creator that suggests this important observation, namely, that since these are God-given faculties, they must be used in accordance with God's eternal law[125] and the laws derived therefrom, be they divine, natural, or human.[126] To say that they may be used as one pleases, is to identify liberty with license. Liberty, however, is one thing, license quite another. Liberty sets man free, to work out securely his end, the pursuit of happiness; license enslaves him, by subjecting his will to every whim and fancy of passion.

The third inalienable right, namely, the pursuit of happiness, is but the end towards which the other two are directed.[127] St. Thomas teaches: "Non enim ad liberum arbitrium pertinet, quod

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124. Cf., e.g., St. Thomas, *Summa Theologica,* I Q. CIII, Art. I.

125. *Ibid.,* I-II Q. LXXI, Art. II ad 4.

126. *Ibid.,* I-II Q. XCIII, Art. III.

127. Beatitude is the ultimate perfection of man. (Cf. St. Thomas, *Summa Theologica,* I Q. LXII, Art. III et IV; Q. LXXIII, Art. I; I-II Q. III, Art. II c. et ad 4; Art. VI c.)—Beatitude is the end of rational nature alone. (Cf. *Ibid.,* I Q. XXIII, Art. I c. et ad 2; Q. XXVI, Art. I et II; Q. LXII, Art. I et IV; I-II Q. III, Art. I ad 3; Q. LX, Art. II ad 3; Q. LXIX, Art. I c.)

volumus esse felices, sed ad naturalem instinctum.''[128] In other words, the pursuit of happiness is a natural tendency,[129] a natural right. For this man has been created, for this he lives, for this he dies. In virtue of this right, he may choose his state of life (be it marriage or celibacy) and the manner of his livelihood and material aggrandizement.

Hence, it is clear, that the phrase ''Life, Liberty and the pursuit of Happiness'' includes all the rights that man may lay claim to as congenital, even if it only implicitly guarantees them. In conclusion, it must be said that the Declaration explicitly recognizes these rights in all men without exception, for all men are equal in nature and, therefore, equal before the law in all that regards this nature.

THE CONSTITUTION AND CIVIC RIGHT

Such is, in short, the political philosophy of *The Declaration of Independence,* relative to the people's rights, — a philosophy, that the framers of the *Constitution of the United States of America* did not fail to infuse into their epoch-making document. As the American Hierarchy recently observed: ''There can be no possible doubt, then, that protection of the natural and inalienable rights of the individual is essential to the very notion of a Constitution.''[130] In accord with this general principle, the *Constitution of the United States of America* was originally planned and subsequently amended. Its very preamble, the insertion of an explicit Bill of Rights and of certain other subsequent amendments together with the all comprehensive Fourteenth, assure men that certain rights exist independent of any State grant. Nor is an exhaustive list of such rights aimed at, as the Constitution so frankly admits in Amendment Nine. Moreover, no such list has ever been drawn

128. *Ibid.,* I Q. XIX, Art. X c.

129. Pruemmer, D., *Manuale Theologiae Moralis,* Vol. I, p. 21—Father Pruemmer says that every philosopher from Aristotle and Plato down to our own day, not even excluding the pessimist Schopenhauer, held and taught this doctrine.

130. ''National Pastoral of the American Hierarchy 1926'', *The Ecclesiastical Review,* 76::6 (June 1927), p. 618.

up, nor has any court ever attempted to define with precision the comprehension of even those actually enumerated in the Constitution. To do so, were, humanly speaking, impossible. Consequently, the author feels that he must acquiesce in the general necessity and limit himself, for the sake of clarity and brevity, to the consideration of the following rights, explicitly assured man in the Constitution and implicitly containing all the liberty he may lay claim to, whether as a human being or as a citizen: I. Religious Liberty, II. Freedom of Speech, III. Freedom from Search, IV. Certain Judicial Rights, V. The Right to Vote and to Hold Office. These are the rights to be considered in the subsequent chapters, for these are in general what are known as the "people's rights". These (with the exception of the Right to Vote and to Hold Office) all, who choose to live within the confines or under the protection of the United States, may equally lay claim to.[131]

It may be objected, that these are in form but federal immunities. Although that is true, yet, as a matter of fact, State Constitutions have almost identical guarantees and, in great part, though not absolutely, are checked in any arbitrary curtailing of these natural rights or consequences thereof, by the Fourteenth Amendment.[132] The only difference, perhaps, that obtains in the various State Constitutions, is the *manner* in which these rights are protected. However, that is not the concern of the present study, which for the sake of feasibility bears primarily on Federal and only secondarily on State guarantees.

But why insist on these rights which are at most mere guarantees, and not grants, incorporated in the Constitution? For the simple reason, that minorities, such as Catholics, may be protected in their God-given rights. Without such a written Constitution, strictly interpreted, minorities would be at the continual mercy of political majorities and organized antagonistic minori-

131. Cf. *Constitution of the United States of America,* Amendment Fourteen: "...nor deny to any person within its jurisdiction the equal protection of the laws."

132. *Ibid., loc. cit.*: "...nor shall any State deprive any person of life, liberty, or property, without due process of law."

ties. It is such a crisis, that the country is presently facing. In view of that, a return to and a faithful interpretation of the Constitution are of paramount importance.

THE SUPREME COURT AND CIVIC RIGHT

The faithful interpretation of the Constitution, as the supreme law of the land, is indeed necessary, if rights are to be preserved.[133] Thanks to our history, our traditions and our practical wisdom in restraining tyranny, we have this interpreter in the Supreme Court. Although, according to the Constitution, the Supreme Court has no *express* authorization to act as its interpreter, the doctrine of judicial control was assumed and maintained as early as the formation of the Constitution itself.[134] In fact, foreign and domestic examples of judicial nullification of unconstitutional legislation long previous to 1803 are not lacking.[135] It was only, however, in February 1803 in the memorable Marbury vs. Madison decision that the doctrine attracted popular attention and gained prestige, when the incomparable Marshall with consummate skill and acumen argued from the text of the Constitution and the oath of office incumbent on the judges their indubitable right to declare null and void an act of Congress not in conformity with the Constitution. Without such a check, Congress would be omnipotent and the Constitution but a mere scrap of paper. The eminent Churchman and patriot, Cardinal Gibbons, once said: "The Supreme Court...provides that practical infallibility which every Constitution must possess if it would be more than a mere scrap of paper."[136] Or,

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133. Taft, W. H., *Popular Government,* New Haven, 1913, pp. 162-168, and especially pp. 225 & 228.

134. Cf. Och, J., *American Political Science* ("The Constitution of the United States"), Columbus, 1921, pp. 70-71—Burdick, C. K., *The Law of the American Constitution, Its Origin and Development,* New York, 1922, pp. 117 ff.—Beard, C., *The Supreme Court and the Constitution,* New York, 1912, chap. 2.

135. Cf. Murphy, W., "Judicial Nullification of Unconstitutional Legislation", *Thought,* Vol. II, No. I (June 1927), pp. 121-134.

136. Cf. Smith, A. and Fitzpatrick, V., *Cardinal Gibbons, Churchman and Citizen,* Baltimore, 1921, p. 246, from "The Constitution and George Wash-

as Viscount Bryce puts it: "The Supreme Court is the living voice of the Constitution...the conscience of the people...the guarantee of the minority."[137] Why, then, should we not strenuously object to those,[138] who would make the Constitution a mere scrap of paper by demanding that the Supreme Court Decisions be unanimous or subjected to Congressional veto? When that comes to pass, America will be a sorry sight,[139] indeed.

As Henry Churchill Semple, S.J. so well expresses it: "We could wish no greater blessing than a Supreme Court...to each of our fellow-members in the family of nations. We American Catholics recognize that this security for our Catholic liberties and our Catholic property has been a great cause of our religious progress, and we long for the day when Catholics in all other lands will have a Supreme Court like ours ever ready to protect them, as it has stood ever ready to protect us for over a hundred years."[140]

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ington" (last article written by the Cardinal and published in *The Baltimore Catholic Review*, Feb. 19, 1921).

137. Bryce, J., *The American Commonwealth*, 2 Vols., New York, 1926, Vol. I, p. 273.

138. E.g., The Third Party headed by Rob. La Follette, Sr. as candidate for president in 1924; and many individuals at the present time (1937).

139. For, as St. Thomas maintains, a tyrannical democracy is worse than a tyrannical monarchy. (Cf. *De Regimine Principum*, Liber I, Caput 5.)

140. Semple, H. C., *American Equality and Justice*, New York, 1918, p. 16—Cf. also Taft, W. H., *Popular Government*, pp. 184, 185.

CHAPTER III

RELIGIOUS LIBERTY

Religious Liberty is by far the most sacred of all the rights of man.[1] Since it implies also Freedom of Education, we divide the chapter into two parts: Part I, Religious Liberty as such, and Part II, Freedom of Education.[2]

Part One: Religious Liberty

The question of religious liberty is so intimately bound up with that of the relation between Church and State, that the one cannot be adequately solved apart from the other. It is for this reason, that we insert this preliminary article, entitled "The Church and the State".

ARTICLE I — THE CHURCH AND THE STATE[3]

UNION For Catholics, the question of the union of Church and State is a closed question, for the

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1. Rather significant in this regard is the statement of Franklin D. Roosevelt in a speech delivered December 9, 1935 at Notre Dame, South Bend, Indiana: "There can be no true national life either within a nation itself or between that nation and other nations unless there be the specific acknowledgement of and the support of organic law to the rights of man. Supreme among these rights we...hold to be the rights of freedom of education and freedom of religious worship." (Quoted in the *America*, 54::11, December 21, 1935, p. 262.)

2. The writer recommends the perusal of Leo XIII's "Libertas praestantissimum"; "The Church and Political Government" by Hon. William Franklin Sands in *The Catholic Historical Review*, New Series 8::1 (April 1928), pp. 127-157; "Church and State — Some Aspects of their Relationship" by T. Daly in *The Ecclesiastical Review*, 95::5 (November 1936), pp. 471-485.

3. The importance of this subject, for American Catholics in particular,

official answer of Rome is most definitive. In this regard, we may cite, e.g., proposition No. 55,[4] censured by Pius IX in his "Syllabus": "The Church must be separated from the State and the State from the Church". But why this censure, this insistence on non-separation? For the simple reason, that the Church is not only divine but also human. As far as her divine and spiritual character are concerned, she does not directly stand in need of State support. But she is also human and as such has need of that material assistance, that is the State's very raison d'être to proffer. True, the Church can exist, prosper indeed, independent of State help. But how much more easily, completely and harmoniously could she fulfill her mission, if she were at all times helped and favored by the State?[5] In fact, the Creator ordained so. By making men social and thereby indirectly creating the State, God certainly wished it to serve His divine plan which was that all men might know, love and serve Him in this world and be forever happy with Him in the next. Now, the State was intended not as an obstacle but as a means to the fulfillment of this end. Complete separation of Church and State thwarts this plan. The State, instead of being a friend and an aid, becomes an enemy or a mere tolerant, indifferent onlooker. At least ordinarily that is the case. Those, who would object to such a union, do so because they fail to study history aright. From an instance or two, they would argue that union of State and Church is harmful and, therefore, inadmissible. Such cases are indeed lamentable, though they are isolated and, therefore, prove nothing or at most very little.

Besides, theory is one thing, practice quite another. So it may

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was forcibly brought home to them by the now famous "Smith-Marshall Open Letter Controversy". Cf. *The Atlantic Monthly*, Boston, 139::4, pp. 540-550 (April 1927) and 139::5, pp. 721-729 (May 1927). For an excellent commentary thereon, cf. *America*, 36::26 (April 9, 1927), pp. 611-614 and 37::3 (April 30, 1927), pp. 53-56. Similarly enlightening are the answers to a questionnaire distributed by *The Christian Register*. (Cf. *America*, 36::17, February 5, 1927, pp. 404 ff.)

4. Cf. Denzinger, H., *Enchiridion Symbolorum*, etc. n. 1755—Also nn. 1615, 1755, 1995.

5. Sortais, G., *Traité de philosophie*, 2 Tomes, Paris, 1911, Tome II, 256.

happen that in a particular instance separation of Church and State, historically and practically viewed, is the best policy. That appears to be so here in the United States, though our set-up is perhaps the only praiseworthy one in the history of nations. When the United States government was instituted a bare 1—136 of the population was Catholic; moreover, the majority of these original founders had come here to enjoy the religious liberty and equality generally denied them in the old world. The most natural thing for them to do, therefore, was to form a Protestant government hostile to Catholics or at least partial to Protestants, or a government separated from any Church allegiance whatsoever and granting by Constitutional right not merely tolerance and religious liberty but parity as well. Fortunately, the latter policy was adopted, and still more fortunately it proved efficient and amicable to Catholic interests. Leo XIII, therefore, in all sincerity could favorably pass upon the American plan of Church and State separation, although at the same time condemning it in principle.[6] Had the Angelic Doctor lived to see this new world venture, he too would have undoubtedly approved it, for did he not lay down the grand principle upon which the separation is in this instance justified?: "...deus autem, quamvis sit omnipotens et summe bonus, permittit tamen aliqua mala fieri in universo, quae prohibere posset: ne eis sublatis, majora bona tollerentur, vel etiam pejora mala sequerentur. Sic ergo et in regimine humano illi qui praesunt, recte aliqua mala tolerant, ne aliqua bona impediantur, vel etiam aliqua mala pejora incurrantur; sicut Augustinus dicit: 'Aufer meretrices de rebus humanis, turbaveris omnia libidinibus' ".[7] Consequently, although this status of separation of Church and State in the United States may not be ideal, still it is justifiable and even desirable, as Cardinal Gibbons once said,[8] and that for

6. Leo XIII, "Immortale Dei", but especially "Longinqua Oceani".

7. St. Thomas, *Summa Theologica,* II-II Q. X, Art. II.

8. Cardinal Gibbons: "Americans rejoice in our separation of Church and State; and I conceive of no combination of circumstances likely to arise which should make a union desirable either to the Church or State....Other country, other manners; we do not believe our system adapted to all conditions....For ourselves, we thank God that we live in America, 'in this happy

reasons of ordinary expediency that obtained in the past[9] and obtain even more pronouncedly at the present.[10] "Fortiter in re, suaviter in modo", applies here as well as in any other question of morals.

RELATION Whether the Church and the State be united or separated, we still have the problem of their necessary mutual relations, for as is patent, both have authority over the same subjects. The Church exacts obedience of Catholics, at the same time that the State looks to them for allegiance. What, then, must govern and limit this twofold sovereignty?

With regard to this delicate yet vital question, the doctrine of the Church is clear and explicit. Did not the Savior ordain "Render therefore to Caesar the things that are Caesar's; and to God, the things that are God's"?[11] And did not the Apostles declare: "We ought to obey God rather than men"?[12] In these two texts of Holy Scripture, we have the solution to this important problem. St. Thomas, Leo XIII and others but paraphrased these words of Scripture. There are two powers, the State and the Church. The concern of the former is civil and temporal; that of the latter spiritual and eternal. Each in its domain is supreme, independent, and exempt from interference on the part of the other. This is the Divine Plan, as the Great Pope of the Working People declared: "Itaque Deus humani generis procurationem inter duas potestates partitus est, scilicet ecclesiasticam et civilem, alteram quidem divinis, alteram humanis rebus praepositam. Utraque est in suo genere maxima".[13] St. Thomas, of course, teaches, substantially, the same.[14]

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country of ours' to quote Mr. Roosevelt, where 'religion and liberty are natural allies'." (Cf. Lapp, J., *The American Citizen,* New York, 1924, pp. 228, 229.)—Cf. also Smith, A. and Fitzpatrick, V., *Cardinal Gibbons, Churchman and Citizen,* p. 114.

9. Namely, a Protestant majority—Cf. St. Thomas, *Summa Theologica,* II-II Q. X, Art. II.

10. Namely, a Protestant majority and a Constitutional guarantee—Cf. *Ibid.*

11. *The Holy Bible* (Douay Version), Matthew, XXII, 21.

12. *Ibid.,* Acts, V, 29.

13. Leo XIII, "Immortale Dei"; cf. also "Sapientiae Christianae".

It is over the question of joint jurisdiction that all the difficulty arises. Let us take a concrete example: Suppose the Eighteenth Amendment had been interpreted as prohibiting Mass wine, and an enforcement law to that effect had been passed. Would the State have been within its jurisdiction, since the case involved a temporal matter? Or would the Church have had just reason to remonstrate, since the case had spiritual consequences? Whose jurisdiction would it have been? Evidently the Church's and that chiefly for two reasons: I. Although the object, wine, is temporal, if only materially considered,—yet it is spiritual, if formally regarded; and, therefore, fully within the Church's domain. II. In the event of conflict, the higher power must be obeyed, for one must "obey God rather than men". But it will be objected that "there is no power but from God".[15] Yes, and for that very reason, there can be no real conflict; what conflict there is, is only apparent. In deciding the question, however, the individual looks to his conscience. The State, in turn, should respect his findings; when it fails to, it is acting outside its domain, it is usurping power not legitimately entrusted to it.[16] When the consequences of such State interference are grave, the Church acts, declaring the manifest injustice of the law or policy and outlining the Catholic's attitude to be taken in regard to it. This is what is meant by the indirect power of the Church in civil affairs.[17] Such, moreover, is in

14. St. Thomas, *In IIum Sent.*, Dist. 44, Q. 2, a.3, ad 4.

15. *The Holy Bible* (Douay Version), Romans, XIII, 1.

16. The American Hierarchy in their "National Pastoral for 1926" said: "The power of the State, coming from God, may be bestowed by the people, but when thus bestowed, it does not and cannot include what is not within the competency of the State to accept. Had God ordained the rule of the State over the soul and conscience, He would have given the State the means to direct conscience and control the operations of the soul, since He gives means to the end." (Cf. *The Ecclesiastical Review*, 76::6, p. 622, June 1927.)

17. For an explanation of the three theories concerning Church power in civil affairs, cf. Ryan, J. A. and Millar, M., *The State and the Church*, pp. 44-48.

substance the teaching of Aquinas[18] and Leo XIII[19] thereon.

Aside from the question of jurisdiction, determined for Church and State, outside of which neither may legitimately exercise its authority, what should be their mutual attitude one to the other? Should it be one of hostility, friendliness or mere neutrality? Evidently, that would depend in large part on the relative union or separation that exists between Church and State.

Where Church and State are united, either of two possible conditions may prevail. First, there is what may be called the "religious State", characteristic of the Middle Ages. Such a State is composed almost exclusively of citizens professing one and the same religion. The State then supports the Church, and the Church the State. The interests of the one are the interests of the other. Crimes against the one are crimes against the other. To fail to promote all the interests of the Church in the minutest details would be failing in a serious duty; to permit another religion to intrude and proselytize would be disturbing the peace and injuring the individual as well as the common good. But the day of such an institution has passed.

In the second place, there is the case of a religious State, say a Catholic one, in which in the course of time other religions have been established. What policy must such a government pursue? First, as for Jews and pagans, they must be tolerated, for they can neither be expelled nor coerced to accept Catholicism, without on the one hand impairing the individual and the common good alike, and on the other doing violence to their will. As St. Thomas observes "...credere voluntatis est".[20] However, the Doctor of the Schools does provide for their expulsion or suppression in case of scandal, perversion or outright persecution of the faithful.[21] As for heretics, a distinction must be made between material and formal heretics. The former may be treated the way the Jews and pagans are, for their heresy constitutes no revolt against allegiance previously sworn; the latter, how-

18. St. Thomas, *Summa Theologica*, II-II Q. LX, Art. VI ad 3.
19. Leo XIII, "Immortale Dei".
20. St. Thomas, *Summa Theologica*, II-II Q. X, Art. VIII.
21. *Ibid., loc. cit.*

ever, like any other class of traitors and disturbers of the public peace, should be held accountable and even punished if necessary.[22] In short, the guiding principle should always be: Tolerate, if that is necessary to avoid a greater evil or to achieve a greater good.[23]

As a matter of fact, however, there exists at the present day no purely Catholic State as such.[24] The Catholic State, as it exists to-day, has been forced by circumstances to grant, by Constitution or postulate of government, tolerance and religious liberty to all sects that are not manifestly repugnant to the natural law and the public peace. The only thing, that remains for such a Catholic State to do, is to declare Catholicism the State religion, to profess it as such on all official occasions, to accord it the protection and the positive favor of the law, to acknowledge and sanction its mandates.[25]

Such is in substance the justifiable attitude of: (1) intolerance in the religious State; (2) tolerance in the modified religious State; (3) tolerance and religious liberty in the constitutional, modified religious State. But in all these States, there is an alliance, a union, more or less intimate, with the Church. What must be the attitude of the State divorced from the Church or rather not united with the Church, as obtains in the United States? Neutrality, of course, is the answer. But neutrality may consist in impartial indifference or impartial friendliness. While the former sounds alright in theory, in practice it is merely synonymous with hostility.[26] History attests to that; the impartially indifferent State is the atheistic State, the State that devitalizes religion by failing to nourish it.

Although separated from the Church, the United States Government has adopted no such policy of impartial indifference.

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22. *Ibid.*, II-II Q. XI, Art. III.

23. *Ibid.*, II-II Q. X, Art. XI; cf. also Leo XIII, "Immortale Dei" (Denzinger, n. 1874).

24. Cf. Pohle, J., "Toleration", *The Catholic Encyclopedia*, Vol. XIV, pp. 763 ff.

25. Cf. Ryan, J. A. and Millar, M., *The State and the Church*, pp. 34, 35.

26. *Ibid.*, pp. 30, 31.

Ours is one of impartial friendliness or friendly parity. As former President Coolidge once remarked: "By tolerance I do not mean indifference to evil. I mean respect for different kinds of good".[27] However, to tolerate is one thing, to grant religious liberty quite another, while to practice friendly parity implies even still more. Moreover, tolerance and intolerance, in turn, may be threefold.[28] The first two varieties thereof, namely, dogmatic and civil tolerance, St. Augustine rather succinctly sums up by saying: "Diligite homines, interficite errores";[29] or, as St. Thomas puts it: "Debemus enim in peccatoribus odire quod peccatores sunt, et diligere quod homines sunt, beatitudinis capaces; et hoc est eos vere ex charitate diligere propter Deum".[30] In other words, one must be intolerant of error, tolerant, however, of the exponent thereof. After all, error and truth are diametrically opposed and, therefore, exclusive of each other;[31] whereas men are similarly constituted and, therefore, claimants to the same love and its necessary consequent or postulate, practical civic tolerance. But what of the third, that which is known as public political tolerance or the duty of the State to leave unmolested all religions not in accord with the personal convictions of the governing party? Evidently, the modern State, composed, as it is, of all creeds and races, could not long exist without it. Civic and public political tolerance are the *sine qua non* of public peace and welfare; intolerance, political suicide. At least, that is the teaching of reason, theology[32] and statesmanship.[33]

The attitude of the United States Government toward religion,

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27. Coolidge, C., "Address to the American Legion Convention" at Omaha, Nebraska, October 6, 1925—Quoted in the *N.C.W.C. Bulletin,* Washington, 8::6 (November 1925), p. 6.—cf. also *New York Times, The,* October 7, 1925, 1:6-8, 2.

28. Cf. Pohle, J., "Toleration", *The Catholic Encyclopedia,* Vol. XIV, pp. 763 ff.

29. St. Augustine, *Contra lit. Petil.* I, xxix n. 31, in *P.L.* xliii, 259.

30. St. Thomas, *Summa Theologica,* II-II Q. XXV, Art. VI.

31. Cf. Denzinger n. 1701 (Pius IX in "Maxima quidem"); n. 2058 (Pius X in "Lamentabili").

32. Cf., e.g., Pohle in the article quoted above.

33. Cf., e.g., Coolidge in the article quoted above.

however, is not one of mere tolerance, but rather one of religious liberty or that liberty of cults not manifestly repugnant to the natural law or the public peace. Tolerance grants liberty, it is true, but it may also subsequently limit or retract it, while religious liberty, properly so-called, is irrevocable in virtue either of a constitutional guarantee (as is the case in the United States) or of some other more or less similar title. Parity, in turn, goes beyond these, for, in virtue of it, not only is one free to practice and spread his religion unmolested, but he and his religion are accorded the equal protection and favor of the law. There is no discrimination, no favoritism; all receive the same or all receive nothing. Such was the philosophy of the founders of the American republic, such has always remained the principle of American government. Jefferson,[34] Lincoln,[35] Roosevelt,[36] all championed this cause.

To sum up, then, the United States Government is divorced from the Church. Although the status is far from ideal, still it seems to be the best working policy, especially since it accords not merely tolerance or religious liberty but also positive amicable parity.

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34. Thomas Jefferson in his letter to Ed. Dowse (April 19, 1803) wrote: "I never will, by any word or act, bow to the shrine of intolerance, or admit a right of inquiry into the religious opinion of others." (Cf. *The Writings of Thomas Jefferson,* 20 Vols., A. A. Lipscomb, Editor-in-Chief, Washington, 1903, Vol. X, p 378.)

Cf. also Burdick, C., *The Law of the American Constitution, Its Origin and Development,* p. 342 ; Munro, W., *The Constitution of the United States, A Brief and General Commentary,* New York, 1930, p. 135.

35. In a letter to a friend, Mr. Joshua F. Speed, (Springfield, Illinois, August 24, 1855), Abraham Lincoln wrote: "When the Know-Nothings get control, it will read 'all men are created equal, except negroes and foreigners and Catholics'. When it comes to this, I shall prefer emigrating to some country where they make no pretense of loving liberty, —to Russia, for instance, where despotism can be taken pure, and without the base alloy of hypocrisy." (Cf. *The Works of Abraham Lincoln,* ed. by A. B. Lapsley, 8 Vols., New York, 1905-1906, Vol. II, p. 247.)

36. Cf. Footnote 1 (Religious Liberty).

ARTICLE II — THE RIGHT OF RELIGIOUS LIBERTY

DEFINITION With the solution of the above important question, that of religious liberty becomes comparatively easy. Before, however, discussing the moral and the legal foundations of this right on the part of the individual and the corresponding duty on that of the State, it may be asked: Just what is understood by this right?

The right of religious liberty, as understood here,[37] may be defined as the freedom of the individual to believe and practice the religion of his choice, in private and public life, free from any legal molestation.[38] This is the meaning that the Constitution attaches to religious liberty, when it declares "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof".[39] Is everyone, then, free to think and do as he pleases as regards things having a moral or religious aspect? Legally he is, though morally he is bound to profess and practice the true religion. God, being Truth Itself, cannot countenance error; He cannot ordain creeds at variance with each other; there can be only one religion that He imposes and that must be the true religion. All other religions, by the very fact that they are at variance with it, must be false.[40] Hence, *per se,* freedom of religion is absurd and is, moreover, not only superstitious but also downright impious.[41] However,

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37. For various acceptations of the term "Libertas conscientiae", with which "Libertas cultuum" is necessarily bound up, cf. Cathrein, V., *Philosophia Moralis,* pp. 274-277.

38. Cf. *Ibid.,* p. 274 (no. 393, 3 & 4); Le Buffe, F., *Outlines of Pure Jurisprudence,* p. 91, defines liberty of conscience as "the right of immunity from external compulsion in following outwardly the dictates of conscience."

39. *Constitution of the United States of America*: First Amendment.

40. Pohle, J., "Toleration", *The Catholic Encyclopedia,* Vol. XIV, p. 765 b, says: "Just as there can be no alternative multiplication tables, so there can be but a single true religion, which, by the very fact of its existence, protests against all other religions as false."

41. Cf. Zigliara, T. M., *Summa Philosophica,* 3 Vol., Parisiis, 1909, Vol. III, pp. 305 sqq.; Reinstadler, S., *Elementa Philosophiae Scholasticae,* 2

expediency dictates that all creeds be tolerated and accorded liberty;[42] otherwise, the social and political peace of the nation would be endangered. That is why religious liberty was incorporated in the Constitution. Once therein and sworn to, the Catholic as well as the non-Catholic is bound to respect it, in virtue of a just contract binding in conscience.[43] Father Pruemmer says: "Leges civiles jura statuentes seu dominium transferentes ordinarie obligant in conscientia ex vera justitia commutativa et non solum ex justitia legali".[44]

However, this does not imply that religious liberty is absolute, subject to no limitation,[45]—for it often happens that the conscience of the individual dictates something repugnant to the natural law, and injurious to the social and political peace. Since it is the duty of the State to preserve order and moderation, and since one person is not obliged out of justice to renounce his rights because of conflict with the erroneous and unreasonable conscience of another,[46]—the State must step in and safeguard the private and the common good alike threatened by the dictate of a false conscience.[47] Since religious liberty is not an end in itself, it must subserve the end for which it was created;[48] when it does not, then its usefulness has ceased and its curtailment or total retraction is imperative.

MORAL FOUNDATION OF THIS RIGHT

Having posited these preliminary principles concerning the right of religious liberty, we may now investigate its moral and legal foundations. Religious liberty, morally considered,

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Vol., Friburgi Brisgoviae, 1923, Vol. II, pp. 528, 529.

42. Zigliara, T. M., *op. cit.*, pp. 306 sqq.; Reinstadler, S., *op. cit.*, p. 529.

43. Cathrein, V., quoted by Reinstadler, S., *op. cit.*, p. 529—Cf. Cathrein, V., *Philosophia Moralis*, p. 439.

44. Pruemmer, D., *Manuale Theologiae Moralis*, Vol. I, p. 176, no. 287.

45. Halleux, J., *Traité élémentaire de philosophie*, I c. 311 ss.

46. Cathrein, V., *Philosophia Moralis*, p. 275.

47. *Ibid.;* Le Buffe, F., *Outlines of Pure Jurisprudence*, p. 92; Och, J., *American Political Science* ("The Constitution of the United States"), p. 28, Q. 134.

48. I.e., social anl political peace—Religious liberty is here understood as freedom from legal molestation in matters of religion (Cf. above, Art.

is founded in nature, and, therefore, is a natural, inalienable right. In substantiation of this contention, we adduce as sufficiently conclusive in themselves the following synoptic arguments drawn from the principles of St. Thomas.

First, it may be argued: Religious liberty, as here understood, is "the freedom of the individual to believe and practice the religion of his choice, in private and public life, free from any legal molestation."[49] The distinctive note of this definition is, evidently, the phrase "free from any legal molestation". If, in point of fact, one is to enjoy religious liberty, in the general acceptation of the term, then he must be free from any legal molestation, for St. Thomas says: "...coactionis necessitas omnino repugnat voluntati".[50] But does one enjoy the religious liberty that is here posited? That one does, there can be no doubt, for does not the Angelic Doctor say "credere voluntatis est"?[51] Now, man has by nature free will,[52] which, therefore, makes his right to freedom of belief also natural and inborn.

The same conclusion may be arrived at by the following process, also based on the doctrine of St. Thomas: God is the end of all creatures (*Summa Theologica,* I Q. XXIII, Art. I). Now, man is free by nature (*Summa Theologica,* I Q. LXXXIII, Art. I). Therefore, man in tending towards his end may do so freely by freely choosing means in view of this end (*Summa Theologica,* I Q. LXXXIII, Art. IV). But this is simply saying that man is religiously free by nature.

One could reason in behalf of religious liberty also as follows: No one may be kept from observing the divine law. Now, conscience points out the application of the divine law to the particular instance. Therefore, conscience is free,[53] and religious liberty must be respected. The major is evident. As to the minor, the doctrine of St. Thomas thereon is briefly this: Lex na-

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II, "Definition".)

49. Cf. above, Art. II, "Definition".

50. St. Thomas, *Summa Theologica,* I Q. LXXXII, Art. I.

51. *Ibid.,* II-II Q. X, Art. VIII.

52. *Ibid.,* I Q. LIX, Art. III et Q. LXXXIII, Art. I.

53. Cathrein, V., *Philosophia Moralis,* p. 275.

turalis est participatio legis aeternae, et impressio divini luminis in creatura rationali qua inclinatur ad debitum actum et finem (*Summa Theologica,* I-II Q. XCI, Art. II). Conscientia nominat applicationem quandam legis naturalis ad aliquid faciendum per modum conclusionis cujusdam. (*In Ium Sent.,* Dist. 24, q. 2, a.3).

In this way, argument on argument could be advanced to prove that the right of religious liberty is a natural, inalienable right. Yet, why multiply arguments, when all the arguments resolve themselves down to this: Man has a natural duty freely to know, love and serve God,—to bind himself to God,—to practice religion. Now, if man has the duty, he has also the right to the means to fulfill that duty. Hence, he must be free in the practice of religion.[54]

LEGAL FOUNDATION OF THIS RIGHT

As for the legal foundation of religious liberty in the United States, much as may be the variance of opinion thereon,[55] in the final analysis nothing strikes one as being more solidly established. The history of the United States is a history of religious liberty, replete with assurances that religious liberty is a natural, inalienable right. Utterances of statesmen, invalidation of hostile legislation, laws, treaties, compacts, all bear out this contention.

Although adventure and gain may have lured some (e.g., the Southern Colonists)[56] to America's shores, it was as a haven of religious freedom that many (especially the New England Colonists)[57] sought her rugged coasts. Is it, then, at all surprising that religious liberty became one of the main concerns of the

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54. Dr. John A. Ryan, in *The State and the Church,* p. 59, shows how this right on the part of the Church is not only natural but also supernatural.

55. Cf., e.g., *America* for a series of articles on The "Christian Nation" Decision: 35::4 (May 8, 1926), p. 96; 35::5 (May 15, 1926), p. 120; 35::8 (June 5, 1926), p. 192.

56. Och, J., *American Political Science* ("The Constitution of the United *States*"), p. 7, Q. 26.

57. *Ibid.,* p. 7, Q. 25.

early colonists? They all sought this prize they held so dear, although after acquiring it themselves many denied it to others.[58] Tolerance vs. intolerance,—such was the struggle fought out to the bitter finish among the early American colonists. Happily, tolerance won, thanks to the magnanimous spirit of early American Catholicism[59]—for was it not the famous Toleration Act of Catholic Maryland that marked the beginning of religious liberty as a basis of government in America?[60] Unbiased history attests to the fact that the Act was drawn up by the conscientious Catholic Cecil Calvert, that it was but the culmination of the policy of religious liberty advocated by the two Catholic Lords Baltimore, and that the General Assembly of 1649, that passed this law,[61] was composed of eleven Catholics and three Protestants.[62] Such is the testimony and such must remain the debt to our ancestors in religion and country. It is true that at a later period William Penn, a Quaker, procured the same for Pennsylvania, while Roger Williams, a Baptist, established it in Rhode Island. And so instance after instance could be cited to prove that the early colonization period was a long struggle for freedom of worship.

Is it, then, at all surprising that the founders of the American

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58. Take, for instance, the repeal of the Toleration Act of 1649 by Protestants in 1654.

59. John La Farge, S.J. once said in a lecture: "Two virtues stood out in the lives of the early Catholic colonists: their simple uncompromising piety, joined in happy combination, with charity and toleration for men of other beliefs."

60. Cf. Ives, J. Moss, *The Ark and The Dove*, New York, 1936.

61. The Act of Toleration: "And whereas the enforcing of the conscience in matters of religion hath frequently fallen out to be of dangerous consequence in those commonwealths where it hath been practised, and for the more quiet and peaceable government of the province and the better to preserve mutual love and amity amongst the inhabitants thereof: Be it therefore enacted that no person or persons whatsoever within this province... professing to believe in Jesus Christ, shall henceforth be in any waies troubled" etc. (Cf. *The Catholic Encyclopedia*, Vol. IX, p. 757.)

62. Brueck, H., *History of the Catholic Church*, 2 Vols., New York, 1885, Vol. II, p. 149; Michael Williams in *American Catholics in the War*, New York, 1921, p. 31, says: Eight Catholics and five Protestants.

government from the very start posited religious liberty as a principle of government? Already in 1791, there being no guarantee for religious freedom in the original Constitution, an amendment thereto was drawn up and ratified, declaring: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof".[63] Such is an American's protection under the Federal Constitution against any arbitrary Federal legislation in regard to his religion. Yet, let him not be deceived; this amendment has no bearing whatsoever on State governments; it acts merely as an inhibition or a check on Federal legislation.[64] The meaning of the amendment is clear, no matter what might have been the original intent of the framers:[65] "*Congress* shall make no law". Not the least reference to the State is made either directly or indirectly. How, then, is one secure in his sacred right of religious liberty against hostile State legislation?

In the first place, one may rightly look to the State Constitutions for protection. If one examines the Constitutions of the thirteen original states at the time of the passing of the First Amendment in 1791, he will find some provision or other (be that in the Constitution or in the Bill of Rights thereto attached) guaranteeing religious liberty.[66] True, originally, some of these thirteen states were theocratic and refused to their own inhabitants the liberty they themselves claimed.[67] However, in the course of time they modified their policy in order to conform it with the spirit of the Declaration of Independence and the First

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63. *Constitution of the United States of America*: First Amendment (in part).

64. Cf., e.g., Munro, W., *The Constitution of the United States, A Brief and General Commentary*, p. 135.

65. Michael Kenny, S.J., in *America*, 19::1 (April 13, 1918), p. 6, declares: "The statement that the First Amendment was intended as a prohibition on Congress is unfounded...the insertion of the Article was construed as a rebuke to the three States which still retained religious restrictions; a rebuke which soon produced the desired effect, making freedom of worship universal."

66. Thomas J. Livingstone, S.J., in *America*, 19::4 (May 4, 1918), p. 81.

67. E.g., South Carolina in its Constitution of 1778.

Amendment.[68] If there is any doubt about this, it is expelled by the requirements of admission, subsequently exacted, by these thirteen, of every one of the thirty-five other states now constituting the union. In the famous Ordinance[69] of July 13, 1787, providing for the government of the North-West Territory and the admission of States to be formed therefrom, we read: "And for extending the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws and constitutions are erected; to fix and establish those principles as the basis of all laws, constitutions, and governments, which forever hereafter shall be formed in the said territory: to provide also for the establishment of States, and permanent governments therein, and for their admission to a share in the federal councils on an equal footing with the original States, at as early periods as may be consistent with the general interest:

"*It is hereby ordained and declared, by the authority aforesaid* [The U.S. in Congress assembled], that the following articles shall be considered as articles of compact between the original States, and the people and States in the said territory, and forever remain unalterable, unless by common consent, to wit:

"Article First. No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship or religious sentiments, in the said Territory."[70] This ordinance, as ratified and signed by George Washington in 1789, applied only to the United States territory northwest of the Ohio River. However, in 1790, with the exception of the anti-slavery clause embodied in Article 6, it was extended to all southwestern territory. It is evident, therefore, that all states,

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68. Thus, e.g., South Carolina later changed its constitution and acknowledged the right of freedom of worship.

69. For a comparatively recent exchange of opinion concerning the legal and organic value of this document, cf. *America*, 37::4 (May 7, 1927), pp. 88-90; 37::7 (May 28, 1927), p. 167; 37::15 (July 23, 1927), pp. 353, 354.

70. *The Public Statutes at Large of the United States of America*, Vol. I (Boston, 1845), the footnote on pp. 51-53 gives the entire text of the ordinance. The exact title of the ordinance is "An Ordinance for the Government of the Territory of the United States north-west of the river Ohio". The above citation is on p. 52.

formed eventually out of territory, owned by the United States in 1790, had as an essential condition of admission to Statehood the obligation to assure religious liberty to their inhabitants. If one understands the words "extending" and "equal footing with the original States" aright, then he is justified in implying that these thirteen original States themselves assured their own inhabitants religious liberty.

But what of territory subsequently acquired? Again, there is the same unalterable condition for Statehood: "...free exercise of their religion without restriction".[71] Such a clause or a similar one, as a matter of fact, is found in every treaty or compact, having at stake the acquisition of additional territory. Let us examine them: The Treaty with France in 1803 for the cession of the Louisiana territory,[72] the Treaty with Spain in 1819 for Florida,[73] the Treaties with Mexico in 1848 and 1853 for territory embracing later five states. They all insist on the same condition. Even the Treaty with Russia for the cession of Alaska in 1867[74] and that with Spain in 1898 for Puerto Rico[75] and the Philippine Islands contain provisions for the religious liberty of the inhabitants.

We see, then, that freedom of religion was imposed as a fundamental law on all governments established under the authority of the United States, from the time of the original compact with

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71. From the *Treaty with Mexico 1848*, Art. IX—Cf. *Op. cit.*, Vol. IX (Boston, 1851), pp. 922-944; the above citation is on p. 930.

72. "...they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess" (Art. III)—Cf. *Op. cit.*, Vol. VIII (Boston, 1853), pp. 200-207; the above citation is on p. 202.

73. "The inhabitants of the ceded territory shall be secured in the free exercise of their religion, without any restriction" (Art. V)—Cf. *Op. cit.*, Vol. VIII (Boston, 1853), pp. 252-278; the above citation is on p. 256.

74. "...the free enjoyment of their liberty, property, and religion" (Art. III)—Cf. *Op. cit.*, Vol. XV (Boston, 1869), pp. 539-545; the above citation is on p. 542.

75. "The inhabitants of the territories over which Spain relinquishes or cedes her sovereignty shall be secured in the free exercise of their religion" (Art. X)—Cf. *Op. cit.*, Vol. XXX (Washington, 1899), pp. 1754-1763; the above citation is on pp. 1759, 1760.

the thirteen founder States in 1789 down to the present day.[76] The Enabling Act of 1864 is but another instance of the same policy in more explicit terms. To claim, therefore, that the State may legislate against religious liberty is to close one's eyes to documents as sacred as they are authentic.

Moreover, may we not also invoke the Fourteenth Amendment? It reads in part as follows:

I. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;

II. "nor shall any state deprive any person of life, liberty, or property without due process of law;

III. "nor deny to any person within its jurisdiction the equal protection of the laws."[77]

This amendment is, indeed, comprehensive,—in fact, the most far-reaching amendment ever engrafted on the Constitution! The Honorable Arthur F. Mullen is of the opinion that it protects man in all his basic rights against any arbitrary State legislation or constitutional provision.[78] By this amendment, the Supreme Court is empowered, as it were, to pass on the constitutionality of any such State legislation or constitutional provision. True, the Fourteenth Amendment had not been effectively invoked to safeguard religious liberty, until recently. But if one is to judge of the times and recent developments, despite all previous Su-

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76. A bill introduced (1936) in congress to provide a permanent government for the Virgin islands of the United States contains the following: "That no law shall be made respecting an establishment of religion or prohibiting the free exercise thereof, and that the free exercise and enjoyment of religious profession and worship without discrimination or preference shall forever be allowed, and that no political or religious test other than oath or affirmation to support the constitution and the laws of the United States applicable to the Virgin islands and the laws of the Virgin islands shall be required as a qualification to any office or public trust under the government of the Virgin islands."

77. *Constitution of the United States of America*: Fourteenth Amendment (in part).

78. Mullen, A., "The Private School and the Fourteenth Amendment", an address given at the N.C.C.W. Convention and recorded in the December 1924 issue of the *N.C.W.C. Bulletin*, 6::7, p. 13, 14, 18.

preme Court decisions to the contrary,[79] there is hardly any more effectual protection for religious liberty than the Fourteenth Amendment. The famous Nebraska Language Case (June 4, 1923) brought this to light. The Honorable Arthur F. Mullen, who acted as counsel in the case, asserts: "But the important point we argued was that religious liberty was protected by the Fourteenth Amendment....The Supreme Court had never had squarely presented to it before the question as to whether or not religious liberty of the citizen was protected from hostile or unfriendly state legislation by the Fourteenth Amendment. We had been arguing all kinds of property rights, all kinds of other rights but it was a strange thing that never before had the Court been asked to pass on the question as to whether the Fourteenth Amendment would protect the individual from hostile or unfriendly legislation by the State".[80] The facts of the case, as they are now authentically known, show that the "liberty" assured in this amendment embraces the right "to worship God according to the dictates of his own conscience",[81] and that religious liberty is comprised in the "privileges or immunities of citizens of the United States". The first part of this statement is explicitly contained in the Decision of the Supreme Court,[82] while the latter part can be implied from the questioning of Chief Justice Taft in reviewing the case.[83] So the Honorable Arthur F. Mullen asserts.—But may not Catholics (and all others for that matter) invoke the third clause also of this part of the amendment, namely, "the equal protection of the laws" section, in defense of their right of freedom of conscience? It would seem so, for if hostile legislation, that impaired their religious liberty, were enacted, they could not be said to enjoy the equal protection of the laws, since their dissenting brethren would be left un-

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79. *Re* Kemmler, 136 U.S. 436—Maxwell *v.* Dow, 176 U.S. 581—State *v.* Cruikshank, 92 U.S. 542—Slaughter House Cases, 83 U.S. 36—Cited by Dudley G. Wooten in *America,* 20::2 (October 19, 1918), pp. 46, 47.

80. Cf. Footnote 78 above.

81. Meyer *v.* State of Nebraska, 262 U.S. 390.

82. *Ibid.*

83. Cf. Footnote 78 above.

molested in the practice of their religion. To sum up, one may take refuge under each of the three clauses of this part of the Fourteenth Amendment; in short, one may argue: (I) that religious liberty, man's sacred right, may not be excluded from the "privileges or immunities of citizens of the United States"; (II) that religious liberty is indubitably contained in "the life, liberty, or property" clause;[84] and (III) that religious discrimination in law violates "the equal protection of the laws" clause.[85]

In concluding this discussion on the moral and the legal foundations of religious liberty, we set forth this semi-moral, semi-legal argument. From a consideration of the Constitution and of the Tenth Amendment[86] in particular, it is evident that government in the United States, whether Federal or State, is a government of delegated power. Since religious liberty is a natural, inalienable right, it may not be transferred or delegated,[87] and hence remains outside the domain of federal and state jurisdiction. As Thomas Jefferson once said: "The rights of conscience we never submitted, we could not submit. We are answerable for them to our God."[88]

DUTY OF THE STATE

Such, then, is one's right to religious liberty. It follows that others, the State included, have a duty not merely to respect that right,[89] but also to protect and promote it. First, the State should remember that freedom *of* religion does not mean freedom *from* religion. As the great Leo XIII,[90] voicing the opinion of the Doctor of the

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84. Meyer *v.* State of Nebraska, 262 U.S. 390.

85. On this subject of religious liberty and the judiciary, the writer very highly recommends an article entitled "The American Judiciary and Religious Liberty" by Clarence E. Martin, in *The Catholic Historical Review*, New Series 8::1 (April 1928), pp. 13-38.

86. *Constitution of the United States of America*: Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

87. Cf. C. I, Art. III Division of Rights, "According to Transferability".

88. Cf. *The Writings of Thomas Jefferson*, Vol. II, p. 221.

89. Cf. C. I, Art. IV Properties of Rights, "Limitation".

90. Leo XIII, "Immortale Dei".

Schools,[91] puts it: "The State, constituted as it is, is clearly bound to act up to the manifold and weighty duties linking it to God, by the public profession of religion". Wise words, indeed, are these, for without religion, not only would the State be failing in a grave duty of dependence on God, but it would also be instituting a policy subversive of itself and destructive of the best interests of its subjects.[92] But does a "public profession of religion" imply union of Church and State? Not necessarily;[93] it merely implies that a government should not entirely expel God and religion from its public acts.[94] Although conditions in this country are far from ideal, yet the United States government admirably conforms to this dictate of reason, to this mandate of Holy Mother Church. We may cite, e.g., the deep religious spirit of the colonists, the Thomism of the Declaration of Independence, the spiritual tone of all important official pronouncements, the strict Sunday observance,[95] the beautiful custom of Thanksgiving and Decoration Days, the insistence on Christian monogamy, the provision for chaplains in the Army and Navy and of ministers to invoke the light and blessing of God on Congressional Assemblies, the exemption of Church property from taxation, the present campaign to put religion back in the schools,—all, evidences that American government and public life are not without religion. No nobler words could have been spoken by churchman than those uttered at the Constitutional Convention of 1787 by Benjamin Franklin: "The longer I live and the more I know, the more I believe that God governs

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91. St. Thomas, *De Regimine Principum,* Liber II, Caput XVI.

92. Cf. Cathrein, V., *Philosophia Moralis,* pp. 432 sqq.; Zigliara, T. M., *Summa Philosophica,* Vol. III, pp. 297 sqq.

93. The American Hierarchy in their National Pastoral Letter for 1926 declare: "While with us there is no union of Church and State, nevertheless there is full and frank recognition of the utility of religion to good government and greater contributions to the happiness of the people, the stability of government and the reign of order." (Cf. *The Ecclesiastical Review,* 76::6, p. 623.)

94. Ryan, J. A. and Millar, M., *The State and the Church,* pp. 29 ff.

95. E.g., our transference of legal holidays from Sundays to Mondays.

in the affairs of men; and if the sparrow cannot fall without His notice, is it probable that an empire can rise without His assistance? 'Except the Lord build the house, they labor in vain who build it'. I firmly believe this, and I also believe that without His concurring aid, we shall succeed in our political building no better than the builders of Babel.''

A second duty incumbent upon the State in regard to religious liberty is to keep it within reasonable bounds and to safeguard thereby the legitimate rights of others. Religious *liberty* does not mean *license*. To preach polygamy, prostitution, child murder, human sacrifice and anarchy, under the guise of conscience, is to undermine the very foundations of morality, of Society and of the State. Now, the end and object of the State is to promote the common good. If, then, a particular religion seriously impairs the common welfare either by being manifestly repugnant to the common conscience of civilization or by preaching principles subversive of authority and civil duties and responsibilities, it should be prohibited by the State. This is the dictate of common sense and right morality[96] that has actually guided legal opinion in interpreting and limiting the religious liberty guaranteed in American constitutions.[97] Religious liberty,[98] after all, is an expedient instituted for the common good; when it fails to fulfill its purpose, its period of usefulness has ceased and it must be curtailed or abridged.

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96. Cf., e.g., Williams, M., *American Catholics in the War*, p. 28; Ryan, J. A. and Millar, M., *The State and the Church*, pp. 35 ff.

97. Cf., e.g., Burdick, C., *The Law of the American Constitution, Its Origin and Development*, pp. 342-344; Munro, W., *The Constitution of the United States, A Brief and General Commentary*, pp. 135, 136; Beard, C., *American Government and Politics*, New York, 1930, pp. 106, 107.

98. Cf. above, Part I, Art. I, ''Union''.

Part Two: Freedom of Education

ARTICLE I — RIGHT OF PARENT AND CHILD

DEFINITION As the sequel will more fully disclose, there cannot be freedom of religion without freedom of education. Now, if education is to be complete, it is necessary that it take cognizance of all the native capacities of man. Man, as we know him, consists of body and soul; his soul, moreover, (unlike that of the animal) is endowed with intellect and will. A complete educational program, therefore, takes stock of all these powers and makes provision for the child's physical, intellectual and moral development. Besides, as Pius XI remarks in his memorable encyclical on the Christian Education of Youth, it must take cognizance of the fact of the fall and redemption of man; in other words, that man has certain disorderly inclinations which can be effectively curbed only when his intellect is enlightened by *supernatural* truth and his will strengthened by *supernatural* help or grace....Hence, freedom of education implies freedom to educate not merely the body and the intellect but the will as well, and that by means that alone can prove effective.

MORAL FOUNDATION OF THE RIGHT The moral foundation upon which this sacred right rests is threefold. The most fundamental of these is matrimony. Canon 1013.1 of the Church Code states: "...the primary end of matrimony is the procreation and education of offspring". Now, the latter duty is but the natural consequence of the former, for if the conjugal act is free, the effects must be imputed to the same free agents. Man is responsible not only for the individual act itself but also for the effects foreseen in general. Hence, on the parent devolves the strict duty of caring for his offspring by maintaining,[99] protecting[100] and educating[101] him

99. Blackstone, W., *Commentaries on the Laws of England,* Vol. I, Book I, C. XVI, pp. 446-450.

100. *Ibid., loc. cit.,* p. 450.

according to his position and vocation in life.[102] Moreover, the natural love of parent for offspring and the offspring's natural dependence on and affection for parent indicate a duty imposed by nature.[103] Besides, since the parent has the duty, he must have the right as well,[104] for duty and right are correlative terms.[105] This is substantially the doctrine voiced by the American Hierarchy in their notable Pastoral Letter of 1919, in which they said: "In the home with its limited sphere but intimate relations, the parent has both the right and the duty to educate his children; and he has both, not by any concession from an earthly power, but in virtue of a divine ordinance".[106]—But does not this duty devolve perhaps one some one else, perhaps even on the child itself? Surely not on the child, for the new-born babe requires the minutest attention and assistance; it is not sufficient for itself, nor capable of full self-realization and social service without the vigilance and help of others. God certainly did not institute the conjugal act for the propagation of the human race, only, then, placidly to look on and see His plan frustrated without the moral guilt of any one. On some one He must have imposed the duty of caring for the child. If it was not on the parent that He imposed it, then it must have been on another, let us say the State since there is no other logical alternate.[107] But this could not be, for public authority has not as direct purpose the domestic good as the education of the child essentially and principally is. Yet it may be objected that as a member of Society, the child should be educated by the State. True, but it is a member of Society only in as far as it is a mem-

101. *Ibid., loc. cit.,* pp. 450, 451.

102. Kent, J., *Commentaries on American Law,* 4 Vols., Boston, 1896, Vol. II, Lect. XXIX.

103. Blackstone, W., *Commentaries on the Laws of England,* Vol. I, Book I, C. XVI, p. 446; Cathrein, V., *Philosophia Moralis,* p. 371 (no. 536).

104. Cathrein, V., *op. cit.,* p. 372 (no. 538).

105. Cf., e.g., C. I, Art. IV Properties of Rights, "Limitation".

106. Guilday, P., *The National Pastorals of the American Hierarchy, 1792-1919,* p. 336.

107. Cathrein, V., *Philosophia Moralis,* p. 446 (no. 654).

ber of the family. Leo XIII asserts: "Filii sunt aliquid patris... proprieque loqui si volumus, non ipsi per se, sed per communitatem domesticam, in qua generati sunt, civilem ineunt ac participant societatem".[108]

As a matter of fact, however, the parent has neither the time nor the means and the qualifications necessary adequately to perform this duty. Hence, schools are instituted to aid the parent to fulfill this important duty; though such institutions neither deprive him of his right nor absolve him of his duty. The parent and he alone is ultimately responsible; on him depends the erection, choice and control of the school. This is the natural order of things.[109]

A second reason, why one may justly claim freedom of education, is because freedom of education is a consequence and an indispensable requisite of the right of religious liberty. In the first place, to educate the intellectual and to neglect the moral faculties of the child would be to impart an incomplete education. Secondly, it would be but multiplying the forces for evil, for in proportion as the mind is developed and made a power for good or evil, in that proportion must the ideals of right conduct be inculcated and the passions restrained. To develop this moral sense aright, to give the child solid motives for conduct and exemplary models for imitation, religion is paramountly necessary if not indispensably so. Religion cannot be separated from morality,[110] nor morality from education. A certain superficial morality, indeed, may be instilled, but without religion as the ultimate basis morality is at most elementary and inconstant. Such has been the doctrine of pedagogues, statesmen and theologians from time immemorial. Comenius says "...the chief aim of education is to live in the happiness of God and in harmony with His teachings", while Pestalozzi asserts "...if religion does not permeate the whole of education, religion will have little influ-

108. Leo XIII, "Rerum Novarum".

109. Cathrein, V., *Philosophia Moralis,* pp. 448, 449 (no. 661); Guilday, P., *The National Pastorals of the American Hierarchy, 1792-1919,* p. 336.

110. Pruemmer, D., *Manuale Theologiae Moralis,* Vol. I, p. 8; cf. also Glenn, P., *Ethics,* St. Louis, 1931, pp. 160 ff.

ence on life; it will remain insolated, remote, formal, mechanical''. So much for the educators; as for Holy Mother Church, Canons 1113, 1372, 1373, 1374 suffice to prove conclusively her sincere conviction that religion plays an integral role in education. We may remark, besides, the stringency of her command that parents must not fail in their important duty of providing an education permeated with Catholic teaching. In fact, her mandate in this regard is so serious that giving a child a non-Catholic education is sufficient reason under certain circumstances for granting a matrimonial separation[111] and for incurring excommunication *latae sententiae*.[112] Nor do pedagogues and theologians alone advocate religious education and insist that religion cannot be separated from morality. George Washington says: ''Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports...And let us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle. It is substantially true that virtue or morality is a necessary spring of popular government....Promote, then, as an object of primary importance, institutions for the general diffusion of knowledge''.[113] Hence, morality, being an essential part of education,—for those who believe religion and morality to be inseparable[114] and who perhaps also fear the danger of contagion or neglect resulting from a godless or non-Catholic education,—for those, freedom of education is but the necessary corollary of freedom of conscience.[115] Without the former, there cannot be the latter.

A third argument, that may be adduced in behalf of freedom of

111. *Canon Law*, C. 1131.

112. *Ibid.*, C. 2319.2.

113. Washington, G., *''Farewell Address''*. Cf. any of the well-nigh innumerable editions thereof, listed, e.g., at the Congressional Library, Washington, D. C.

114. Guilday, P., *The National Pastorals of the American Hierarchy, 1792-1919*, p. 338.

115. *Ibid.*

education, is one closely akin to that of religious liberty and to that of freedom of speech (as will be seen in the next chapter). The argument, advanced here, is that of liberty of opinion and expression. Each man, endowed as he is by nature with an intellect to form opinions, a vocal organ to express them and a sense of hearing and sight to learn those of others, must have by nature the right of teaching and of being taught.[116] As long as the superior rights of truth, charity and justice are not infringed upon, this freedom in the natural order of things must be respected. Nor may the doctrine of uniformity of education, as advocated by exponents of the nationalist school, be advanced against it. The superior right of individual liberty and reasonable expression of personality stands opposed to any such policy. Besides, democracy means a "leavening", not a "leveling", as Dr. Ryan once so aptly put it.[117]

LEGAL FOUNDATION OF THIS RIGHT

Before studying the legal foundation of educational freedom in the Uuited States, we must, for the sake of clarity, preface a remark as to the general historical status of the question. Every now and then, Catholics must hear the sneering observation that the public school is *the* American school as conceived by our forefathers. The only pity is that those who make the observation are either entirely ignorant or wilfully oblivious of history. As a matter of fact, those high-spirited pioneers, who signed *The Declaration of Independence,* who shed their blood for freedom and who framed the Constitution, never saw the inside of a public school, for they did not then have such an institution. Every school in the colonies and in the young republic was controlled by private enterprise and was in all respects eminently religious. Two authorities will suffice, we believe, to

116. Cf., e.g., Cathrein, V., *Philosophia Moralis,* pp. 450, 451 (no. 664); Mercier, D., *A Manual of Modern Scholastic Philosophy,* Vol. II, p. 275 ff. (J. Halleux).

117. Ryan, J. A., *Private Schools are in Danger,* (Pamphlet).—For the advantages resulting from freedom of education, cf. Guilday, P., *The National Pastorals of the American Hierarchy, 1792-1919,* p. 338.

prove this contention. Cubberley in his *Education in the United States* says: "The most prominent characteristic of all early colonial schooling was the predominance of the religious purpose in education....The catechism was taught and the Bible read and expounded....Everywhere the religious purpose was predominant".[118] In Monroe's *Cyclopedia of Education,* we read: "Every school taught the catechism".[119] In fact, schools continued teaching the "catechism" as late as 1837,[120] when Horace Mann imported from Europe an educational system that divorced religion from education. It was only an expedient, it is true, but it was short-sighted and had such deplorable effects in eradicating religion and a sense of duty that presently many prominent persons and organizations are demanding that religion be put back in the schools.[121]

In view of these facts, is it all surprising that the school question is not explicitly mentioned in the Constitution? At the beginning of the American republic, schools were controlled entirely by private organizations and subserved the higher end of religious instruction and training. State monopoly of schools was

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118. Cubberley, Ed., *Education in the United States,* Boston, 1919, pp. 28, 29.

119. Monroe, P., *A Cyclopedia of Education,* 5 Vols., New York, 1911-1913, Vol. II, p. 119; cf. Adams, J., *The Founding of New England,* Boston, 1921, p. 370; cf. Small, W., *Early New England Schools,* Boston, 1914, p. 88.

120. Although there were a few free schools in Massachusetts already in 1780, tax support of schools was adopted in that state only in 1880. However, these few free schools were in no sense public schools.

121. For some comparatively recent and startling statements, made by prominent non-Catholics, as regards the need of religion in the schools, cf., e.g., *America,* 36::7 (Nov. 27, 1926), pp. 149, 150; 36::10 (December 18, 1926), pp. 227, 228, 236, 237, 238; 36::22 (March 12, 1927), p. 517; 37::24 (September 24, 1927), pp. 557 ff.; 37::26 (October 8, 1927), pp. 605 ff.; 38::3 (October 29, 1927), p. 55; 38::4 (November 5, 1927), p. 90; 38::8 (December 3, 1927), pp. 173, 174; 38::11 (December 24, 1927), pp. 254, 255; 39::8 (June 2, 1928), p. 174; 39::10 (June 16, 1928), p. 23, etc., etc. —Cf. *The Register,* Denver, Colorado, Vol. XI, No. 51, p. 1 for December 22, 1935 for a similar plea, made by the Pacific Edition of the *Christian Advocate.*

unthought of; while the feasibility of having it, would have been discordant with the founders' idea of religious liberty, since for them religion played such an important role in education. Hence, the question was not dealt with in the Constitution, or at most only implied in the First and Tenth Amendments and later in the Fourteenth. However, one of the most noted American State papers, the Ordinance of 1787, furnishes us with an insight into the friendly attitude of the State at that time towards the private school. It says: "...religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged".[122] And this has always been until recent years the attitude of our Government. Historically the private school could justify its existence, although legally its status was not so clearly defined. Thanks to the enemies of the private school who forced the issue, the two Supreme Court decisions of June 4, 1923[123] and June 1, 1925[124] make indubitable the interpretation of the Constitution on this question. The Fourteenth Amendment served as the basis in both decisions. In the Nebraska Foreign Language Case, the Supreme Court of the United States clearly stated:[125] 1. That "Without doubt" the liberty assured in the Fourteenth Amendment "...denotes...the right of the individual ...to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized by common law as essential to the orderly pursuit of happiness by free men"; II. That "Corresponding to the right

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122. Cf. *The Public Statutes at Large of the United States of America,* Vol. I, p. 52 footnote.

123. Robert T. Meyer, a teacher in a Lutheran parish school, had been convicted of conducting a Bible History lesson in the German language—The decision was an appeal against the verdict. Cf. Meyer *v.* State of Nebraska, 262 U.S. 390-404.

124. The Oregon Law obliged every child between the ages of 8 and 16 years, who had not yet finished the Eighth Grade, to attend the public school—The Supreme Court decision declared this law unconstitutional. Cf. Pierce et al. *v.* Society of Sisters, 268 U.S. 510-536.

125. The following are extracts from the official decisions.

of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the States, including Nebraska, enforce this obligation by compulsory laws''; III. That one's ''right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the Amendment''; IV. ''That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected''; V. That ''a desirable end cannot be promoted by prohibited means''. Explicit and final as this decision may appear, it was left to the Oregon Anti-Private School Law Supreme Court Decision to define for all time a doctrine dear to all Catholics and Americans: ''...Under the doctrine of *Meyer v. Nebraska*, 262 U.S. 390, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose exclude any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. *The child is not the mere creature of the State;*[126] those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for *additional obligations*''.[127] Attention is called to the last two words, ''additional obligations'', since they imply that education has not as sole object preparation for citizenship, but extends beyond this to the individual good, to obligations transcending those due to the State.

With these two important interpretations of the Constitution, freedom of education becomes legally recognized. There is no longer reason for fear. Education is now acknowledged by law

126. The italics are ours.

127. The italics are ours.

to be an inherent, inalienable right. It may not be taken away. It is God-given, not State-granted. Moreover, should the time ever come or the circumstances ever so ordain, one could legally defend his right to freedom of education in the same way as he does his right to freedom of conscience.

ARTICLE II — RIGHT OF STATE AND CHURCH

Such is the status of freedom of education in the United States. However, it should not be inferred, from what has been said, that education is solely a domestic problem; it has also its secular and religious aspects and, therefore, comes within the just domains of State and Church.

WHAT THE STATE MAY AND SHOULD DO

Since the child is also a member of Society, it should be given an education that will fit it for Society. But this is the domain of the State. When, then, may and must the State step in, and how far may it legislate in this regard? In general, it may and must do so, whenever through defect or negligence on the part of the parents, the child's welfare or the common good may demand it. True, the extent of education to which a particular child has a right cannot be definitely set, nor still less can a uniform norm be set for all children without exception. However, it may be said, that in general a child may lay claim to the ordinary opportunities befitting its station in life, and that the State may define at least in a general way the minimum of education necessary for that purpose. On the other hand, as far as the common good is concerned the State undoubtedly has the right to safeguard itself against disturbers of the peace and the general welfare. In short, it may step in (whether education be public or private) whenever anything manifestly repugnant to the natural law and the social and political order is taught. Of course, this State control may be open to abuse, though the principle still must be granted.

This is the doctrine of the Church, as outlined by theolo-

gians[128] and subscribed to by the American Hierarchy;[129] this also is the opinion of the courts, as expressed in the two important Supreme Court decisions above referred to.[130] In conclusion, however, permit us once more to observe, that this power of the State is subordinate to that of the parent; defect or negligence on the part of the parent, resulting in manifest injustice to the child or serious injury to Society, alone justifies the State's interference and that only by legitimate means.

WHAT THE STATE MAY NOT DO

Beyond this, the State may not act. In general, it may be said, that the State is limited in this regard by the fundamental rights of the citizen and more specifically of the parent, as long as these rights do not come in conflict with any superior right. At all times, the State is bound to respect them. Hence, a State monopoly of schools whereby the State arrogates to itself the *exclusive* right of *establishing* schools, cannot be justified. The parent, being in many cases incompetent adequately to provide for the education of its offspring, is obliged to entrust it to others. If the State claims the monopoly on schools, the parent is obliged either to neglect the education of the child or to entrust it necessarily to the State, which evidently is thereby encroaching on the natural, inalienable right of the parent to provide for the education of its offspring, as it may seem fit. State monopoly is opposed not only to this right, but also to that by which the parent, like any other mortal, enjoys by nature liberty of opinion and expression, in other words liberty or the right of teaching (at least in the natural order of things).

State monopolization of education may go even further by attempting to foist on the people what the State of Oregon recent-

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128. Reinstadler, S., *Elementa Philosophiae Scholasticae*, Vol. II, pp. 501, 502, 505; Cathrein, V., *Philosophia Moralis*, p. 445 (no. 652), p. 449 (no. 662), pp. 457-459 (no. 678 & no. 679); Rickaby, J., *Moral Philosophy*, pp. 358, 359.

129. Guilday, P., *The National Pastorals of the American Hierarchy, 1792-1919*, p. 337.

130. Both the Nebraska and the Oregon Supreme Court Decisions refer to the fact that all concede the State the right of "reasonable interference".

ly tried to. Thus, to oblige all for a certain number of years *to attend* State schools is manifestly usurping parental authority without legitimate reason. Moreover, if these State schools are non-Catholic, there is an added abuse.

The State, then, may neither claim the exclusive right of establishing schools, nor oblige attendance for a definite period of time at these schools. At most it may insist that parents fulfill their duty of giving to their children an education, suitable to their particular station in life and essential to the peace and welfare of the community. Sometimes attendance at the school of their choice may suffice, sometimes mere home education may be sufficient. So the Church teaches;[131] so the State ordains, at least in the United States.[132]

WHAT THE CHURCH MAY DO

As was mentioned above, education, although a domestic affair, has besides secular and religious aspects. The former, of course, are the concern of the State; the latter, undoubtedly, of the Church. To her belongs the exclusive right to control the religious education of mankind;[133] parents are but her handmaids designated by nature, while the State must always act in this matter with her permission and in her name. To the Church was committed the mandate of the Savior: "Going therefore, teach ye all nations".[134] With her, in consequence, rests the right to teach religion, to commission others to do so and to supervise whatever may bear thereon.[135]

If to the fulfillment of this religious end, the Church should deem the ordinary intellectual schooling in profane subjects a necessary means (as she actually does),[136] she could command

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131. Cathrein, V., *Philosophia Moralis*, pp. 445-455 (no. 652 – no. 671); Reinstadler, S., *Elementa Philosophiae Scholasticae*, Vol. II, pp. 503 sqq.; Guilday, P., *The National Pastorals of the American Hierarchy, 1792-1919*, pp. 337, 338, 339.

132. Nebraska Decision (Cf. Section IV, quoted above, Part II, Art. I, "Legal Foundation of this Right").

133. *Canon Law*, C. 1381.

134. *The Holy Bible* (Douay Version), Matthew, XXVIII, 19.

135. *Canon Law*, C. 1381.

136. *Ibid.*, CC. 1372, 1373, 1374, 1379, 1381.

parents to send their children to her schools. Nor does she depend on the parents or on the State for her right to establish schools, even though these institutions be of a secular and superior nature.[137] The Church is a perfect society, autonomous, independent. Any means she may consider necessary to her end, she may create, Christian education being one of them. Besides, she enjoys this right, in virtue of the law of prescription, since she has been from time immemorial the "mater scholarum".

ARTICLE III — SPECIAL PROBLEMS

THE QUESTION OF RELIGION

The Church, therefore, has both the moral and the legal right here in the United States to establish and maintain schools of her own. Not only that, but she insists that her children attend her institutions of learning and no others, for she firmly believes that an education that is not leavened with religion is not only an incomplete but also a perverse education. Does she, then, condemn all other institutions of learning?[138] Most assuredly, though a distinction must be made.

As for the sectarian (heretical) or the infidel school, there is almost always the proximate danger of perversion. Therefore, Catholics may not ordinarily attend them, except under certain grave circumstances and after sufficient safeguards against perversion have been provided for. In all cases, moreover, the local ordinary must be consulted.[139]

If that is the case, what may be said about the public school? The restriction is the same.[140] They may not be frequented, though there the danger of perversion be less. In general, the

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137. *Ibid.*, C. 1375.

138. Concerning the frequentation of non-Catholic schools, cf., e.g., Pruemmer, D., *Manuale Theologiae Moralis*, Vol. I, pp. 359 sq.

139. *Canon Law*, C. 1374; cf. "Instructions of the Sacred Congregation for the Propagation of the Faith" for the United States, dated November 24, 1875: n. 1449; cf. St. Thomas, *Summa Theologica*, II-II Q. X, Art. IX.

140. Cf. footnote above (139).

American public school may be classed as neutral or mixed; therein nothing offensive to the religious convictions of the students is taught. At least so it is in theory, though one may seriously doubt whether that even, unbiased poise of opinion can obtain in fact. Not only that, but as Dr. Luther A. Weigle of Yale once remarked: "When the public school ignores religion, it conveys to our children the suggestion that religion is without truth or value. It becomes, quite unintentionally, I grant, a fosterer of atheism and non-religion."[141] Such a school, like the positively non-Catholic school, may be at most tolerated.[142]

Yet are not these harsh words? Perhaps, though the statistics are harsher. Why is it that three out of every five Americans disown all connection whatever with organized religion?[143] Why is it that our prisons are filled largely with those who confess to a lack of early religious training?[144] It is because, for the past hundred years, the majority of Americans have been taught and are continuing to be taught in religionless schools,—deprived of that early religious training which alone can make them upright citizens and honest business men. The dire results of such a schooling have frightened the more thinking communities and individuals into putting religion back into our schools.[145] The start has been made, though the program[146] at present is far

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141. In an address on May 15, 1926 (Recorded and commented upon in part in the *America*, 35::7, p. 149 for May 29, 1926).

142. Cf. footnote above (139).

143. Cf. *America*, 37::4 (May 7, 1927), p. 79; 37::23 (September 17, 1927), p. 535.

144. Rev. Leo Kalmer, O.F.M., chaplain at the Illinois State Penitentiary, some years ago (1916-1918) made a study of the inmates of Folsom, Cal. (1918); Carson City, Nev. (1916); Eastern Pen, Philadelphia, (1917); Western Pen, Pittsburgh, (1917). He found that the averages for school attendance were: 3.39 educated in private schools only; 75.14 in public schools only; 8.67 in both; 12.80 in none.—Father Francis J. Lane of the State Reformatory at Elmira, N.Y. made a similar study, some years later (Cf. *America*, 36::1, p. 17 for October 16, 1926).

145. For various plans suggested for reforming the public schools, cf., e.g., *America*, 36::10 (December 18, 1926), pp. 236, 237, 238, 37::10 (June 18, 1927), pp. 231, 232; 37::11 (June 25, 1927), pp. 256, 257.

146. Cf. Beman, L., *Religious Teaching in the Public Schools*, New York,

from ideal. It calls merely for the formal teaching of religion on school time by approved ministers to the adherents of their particular creeds demanding such instruction.[147] One spiritual meal a day and three on Sunday cannot keep people religiously well; the whole of education must be permeated with religion.[148] But is this legal and feasible in the United States, where freedom of religion is accorded by law? It surely is, for the State could assure an exclusive school with all its facilities to every reasonable number of students of one religion demanding the same in a given locality. Such a system would eventually put religion back into the schools and the minds and hearts of the people. In practice that is the plan we propose for the sake of expediency; in theory, of course, we concede nothing. Catholic education like the Catholic religion alone is true, and hence alone has the undisputed right to exist and to propagate.

THE QUESTION OF FINANCE

Such a plan naturally brings up the question of finance. Much might be said thereon; however, for the sake of brevity, we merely outline the salient, underlying principles in the controversy. As it obtains generally (with the exception of a few more or less satisfactory local arrangements) Catholics contribute to the support of the public schools, without receiving any remuneration in return from the State for the support of their own

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1927; Archdeacon, J., *The Week-Day Religious School and Catholic Action*, Washington, 1927; Ryan, "The Week-Day Religious Education Movement", (in *Thought*, Vol. II, No. 2, pp. 197-215, for September 1927); *The Ecclesiastical Review*, 77::5 (November 1927), pp. 463-473.

147. For the legality of such procedure, cf. *America*, 35::4 (May 8, 1926), pp. 88, 89, 90; 37::6 (May 21, 1927), p. 126.

148. Cf. Pius IX, "Optime Noscitis" (March 20, 1854)—Archbishop Curley of Baltimore said on March 8, 1926 at the fifth annual Conference of the District of Columbia Chapter, International Federation of Catholic Alumnae: "It has been said that Catholic education is merely secular education plus instruction in religion, and that secular education is merely Catholic education with religious instruction left out. Both contentions are false and evidence an ignorance of the true purpose and worth of Catholic education. In a Catholic education religion permeates the very atmosphere of the school." (Cf. *America*, 34::23, p. 537 for March 20, 1926.)

schools. Every year twenty million Catholics are obliged to expend more than seventy million dollars for the *maintenance* solely of their own institutions, exclusive of the initial expense of buildings etc. and the enormous saving effected by employing religious as teachers.[149] Why this gross injustice?[150] The Catholic schools teach the same subjects; Catholics contribute the same amount of taxes. It was not always thus, as American history conclusively demonstrates.[151] Formerly American schools were religious and notwithstanding received State support. The rise of dissentient religious sects among the colonies and the States gave rise to the non-sectarian school.[152] On principle, the Catholic could not send his child to such an institution; he, therefore, justly demanded State support for the continuance of his own school. At first it was accorded, but in the course of time almost generally withdrawn.

Catholics, for the most part, have been content to bear this manifest injustice. They believed that without State support, there would be no meddling; their freedom was thus assured they thought. But the opinion seems to be changing now. Religion is being partially put back into the public schools; the feasibility of State aid is becoming more apparent, Quebec, Ontario,[153] Holland[154] and others[155] having shown the way. Nor have Catholics anything to fear from State interference, should they receive such assistance. The State's domain always remains the same; as was seen, it may concern itself only with those affairs that are of a purely social or political character; never may it meddle with religious affairs or with the primary parental

149. For the statistics, cf. *N.C.W.C. Bulletin*, 8::7 (December 1925) p. 23.

150. Pruemmer, D., *Manuale Theologiae Moralis*, Vol. I, p. 179; cf. *Commonweal*, April 24, 1936, pp. 785, 786, "Justice for Catholic Schools".

151. Cf. *The Catholic Encyclopedia*, Vol. XIII, pp. 560, 583.

152. Burns, J., *The Catholic School System in the United States*, New York, 1908, pp. 359 ff.

153. *The Catholic Encyclopedia*, Vol. XIII, pp. 563 ff.; *Commonweal*, June 12, 1936, pp. 180, 181, 182, "Ontario Schools".

154. Cf. *America*, 22::7 (December 6, 1919), pp. 125, 126—For the good results consequent on Holland's school law, cf., e.g., *America*, 36::5 (November 13, 1926), p. 103.

155. E.g., Alsace-Loraine.

right of education unless abused.[156] All, Catholics ask, is a proportionate share of the school funds, as long as they are doing the same efficient work as the public schools. If to receive that they would have to sacrifice some of their more sacred rights and thereby to be enslaved, then of course they could not and would not advocate any such policy.[157]

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156. Cf. above, Part II, Art. II, "What the State May and Should Do" and "What the State May Not Do".

157. Cf. also on this question: *America,* 31::15 (July 26, 1924), pp. 361, 362; 31::16 (August 2, 1924), pp. 376, 377; 31::26 (October 11, 1924), p. 619.

CHAPTER IV

FREE SPEECH

ARTICLE I — DEFINITION OF FREE SPEECH

LIBERTY OF OPINION AND FREE SPEECH

The expressions "liberty of opinion" and "free speech" are used synonymously in many of our textbooks and public utterances. Yet the two expressions, although very similar (or better, very closely related) should be distinguished, as the former has a larger extension than the latter. Hence, they should not be used synonymously, unless the meaning of the one is restricted or that of the other extended.

Liberty of opinion implies two things: Choice of opinion and manifestation of the same. The former is an interior act and, therefore, entirely free of any external coercion. In this sense, one enjoys unlimited liberty of opinion. However, the mind is bound by the interior laws of thought to assent to truth,[1] and, therefore, in virtue of the principle of contradiction, to be intolerant of error. Hence, in this sense, i.e., as far as *choice* of opinion is concerned, there can be no freedom. Scepticism, indifferentism to truth and error alike, have generally been frowned upon by fair-minded and discerning philosophers.

FREE SPEECH POSITIVELY CONSIDERED

From choice of opinion to the manifestation thereof is but a natural step. In this extended sense liberty of opinion is synonymous with free speech. What, then, is meant by free speech? By free speech is meant the freedom to manifest exteriorly one's ideas and views, to communicate to others what one believes to be true or at least doubtful.[2] The words "mani-

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1. St. Thomas, *Summa Theologica,* I Q. LXII, Art. VIII ad 2; I-II Q. XVII, Art. VI.

2. Mercier, D., *A Manual of Modern Scholastic Philosophy,* Vol. II, p. 277 (J. Halleux).

fest'' and ''communicate'' have a rather wide extension, and it is for this reason that the subject of free speech becomes so extensive. One may ''manifest'' his opinion by speech, in ordinary conversation or in public utterance; one may use the radio, the phonograph, the newspaper, the periodical, the book, the tabloid, the movie, the stage, the statue or painting, etc., to ''communicate'' his thoughts to others. Such is the extensive use of the term.

FREE SPEECH NEGATIVELY CONSIDERED

The right of free speech (which is but a logical implication of man's civil liberty) has a twofold character.[3] It is positive, inasmuch as private law indicates that this right is God-given and inborn. It is negative, inasmuch as public law respects and protects it. It is in the latter sense that free speech is ordinarily understood in the United States; it is not a state-bestowed right, but rather an immunity. Now, this immunity is merely the natural implication of the right, for if man is possessed of the moral inviolable power (as every right is),[4] then it becomes the bounden duty of others to respect that power.[5] The State recognizes this and, therefore, declares it immune. Hence, the right of free speech, as here understood, consists essentially in the *immunity* to exercise that right, and may be defined as: *The moral and legal freedom from all undue interference in the exterior manifestation of one's opinions.*

FREEDOM FROM CENSORSHIP NOT CENSURESHIP

This ''immunity'' or freedom from ''undue interference'' means freedom, not from censureship but from censorship.[6] Formerly the Latin word ''censura'' in its twofold sense of ''censura repressiva'' and ''censura praevia''

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3. Och, J., *American Political Science* (''The Constitution of the United States''), pp. 24, 25.

4. Cf. C. I, Art. I Definition of Right, ''Right as a Moral Faculty''.

5. Cf. C. I, Art. IV Properties of Rights, ''Limitation''.

6. Blackstone, W., *Commentaries on the Laws of England*, Book IV, C. XI, sec. 152.

connoted both these ideas.[7] However, since the term is taken in modern times in the latter sense only, freedom of speech means in modern states merely freedom from "censura praevia" or pre-lease censorship. Censureship, implying as it does the responsibility for the abuse of the right, has not been abrogated, but rather postulated by the immunities found in the constitutions of our most liberal states. Since unlimited free speech is in principle untenable, as will be shown later, the words "immunity" or "undue interference" in our definition mean freedom merely from censorship.

ARTICLE II — FOUNDATION OF THIS RIGHT

MORAL FOUNDATION

Free speech, as all other rights considered in this dissertation, has a twofold foundation: the one moral, the other legal. Morally considered, free speech is a natural, inalienable right. It is an innate right, the natural heritage of every human being, a right which cannot be renounced without doing violence to his human nature. One arrives at this conviction from a threefold consideration. If man is of a rational and social nature and if he is endowed with faculties for communicating to and receiving from others, ideas — if he is so constituted, it follows that he enjoys the right of free speech by a gift of nature and not as a result of human bestowal.[8] That man is so constituted is a fact of internal and external experience alike.

Man is a rational being.[9] He is endowed with intellect and will, and in the possession thereof is distinguished from the brute. True, he has sensibility, cognition and appetite in common with the brute. But there is something in the cognition and appetite

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7. Hilgers, J., "Censorship of Books" in *The Catholic Encyclopedia,* Vol. III, p. 519 d.

8. Mercier, D., *A Manual of Modern Scholastic Philosophy,* Vol. II, p. 277 (J. Halleux); Le Buffe, F., *Outlines of Pure Jurisprudence,* p. 90.

9. St. Thomas, *Summa Theologica,* I Q. LXXXVIII, Art. III c.; I-II Q. V, Art. I ad 1.

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9. St. Thomas, *Summa Theologica*, I Q. LXXXVIII, Art. III c.; I-II Q. V, Art. I ad 1.

of man that transcends these in the brute. The brute can know only the particular and hanker only after the sensible; whereas man, on the other hand, can conceive the universal and desire the supersensible in virtue of his two God-given gifts of intellect and will. By means of the intellect, he can form universal ideas, pronounce judgments, discover, explain and demonstrate truth by reasoning. By will, he is capable of desire in conformity with this reason. These two faculties are distinctive of man. Image cannot be identified with idea, nor instinct and appetite with will. Man alone possesses the ability to conceive the universal and to desire the supersensible.[10]

Such is man's rational nature. But man is not only rational; he is also social and by nature seeks the company of his fellows, as was conclusively demonstrated in the second chapter.[11]

Besides being of a rational and social nature, man is endowed with various adjuncts of nature whereby he can communicate to and receive from others ideas and views. He has the sense of hearing, sight, touch, taste and smell, and above all the faculty of speech, all of which assist him in this twofold process. St. Thomas says; "...est proprium hominis locutione uti, per quam unus homo aliis suum conceptum totaliter potest exprimere".[12]

But why all these gifts of nature, if they are not to be used? Can one conceive of an all wise Designer and Creator endowing His creatures in this manner unto no purpose? Certainly He must have had an end in view, and whatever might have been the ultimate end, the immediate could have been nothing else than the use of these faculties. One cannot conceive of God making anything in vain; even His creature never acts except in view of an end.[13]

Such, in brief, is the doctrine of the Stagirite and that of the Doctor of the Schools. Aristotle says: "Nature, as we often say, makes nothing in vain, and man is the only animal whom she has endowed with the gift of speech....the power of speech is intend-

10. Cf. Any manual of Scholastic Philosophy.
11. Cf. C. II, Art. II Civil Society or the State, "Origin of Civil Society".
12. St. Thomas, *De Regimine Principum*, L. I, Caput I.
13. St. Thomas, *Summa Theologica*, I-II Q. I, Art. I ad 2.

ed to set forth the expedient and inexpedient, and, therefore, likewise the just and the unjust".[14] If, then, one admits the existence of God as nature's Creator, then according to the logic of this pagan philosopher, one must admit that the right of free speech is not only natural but also God-given. As St. Thomas succinctly expresses it: "...significare conceptus suos est homini naturale; sed determinatio signorum est secundum humanum placitum".[15]

LEGAL FOUNDATION

The right of free speech is not only a natural heritage, but also a legal immunity in the United States.[16] In fact, without such a basic legal immunity as free speech, the American democratic venture could not have long survived. Free speech is essential to a popular, representative form of government.[17] Without it, rule soon passes from the people to officials, tyranny replaces just and discretionary legislation, the rights of the people and those of minorities in particular are abrogated or rendered meaningless—in short, democracy becomes shipwrecked on the rocks of irresponsible and obtrusive officialdom. With free speech, democracy even under the most unfavorable conditions becomes bearable and in many ways efficient. Public opinion reaches officials in countless ways and induces them to rule wisely and justly, for fear of a powerful electorate and of the manifold influence of the non-voting mass. Minorities are thereby protected; they can organize, voice their opinions, gain adherents, justly influence

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14. Aristotle, *Politica,* I. 2 (Ross).

15. St. Thomas, *Summa Theologica,* II-II Q. LXXXV, Art. I ad 3—Cf. also *De Regimine Principum,* L. I, Caput I.

16. The status of free speech in the early days of the American Republic (as viewed by an outsider) is briefly outlined by Alexis de Tocqueville in his *De la démocratie en Amérique,* 2 Tomes, Bruxelles, 1835, Tome II, C. III.

17. Blackstone, W., *Commentaries on the Laws of England,* Book IV, C. XI, sec. 152; Taft, W., *Popular Government,* pp. 99 ff.; Lapp, J., *The American Citizen,* p. 33; O'Brian, J., *Civil Liberty in War Time,* Washington, 1919, p. 20; France, J., *The Restoration of American Liberties,* Washington, 1920, p. 7; Guibert, J., *Cours de Morale,* pp. 251, 252; *America,* e.g., 18::2 (October 20, 1917), pp. 46, 47; 35::16 (July 31, 1926), p. 367; 37::23 (September 17, 1927), p. 535.

legislation and court decisions, and wield the all potent weapon of the ballot. As Charles A. Beard puts it: "The one secure check [on tyranny and abuse of authority in government] is the right of the people to discuss freely the measures and policies of the government and to unite peaceably in opposing them."[18] Former President and Chief Justice William Howard Taft voices a similar opinion: "It [public opinion] is the saving grace in the defects of popular government. It grows out of publicity and a free press".[19]

Is it, then, at all surprising that free speech, after religious liberty, was one of the first rights listed in the Bill of Rights? The first amendment to the Federal Constitution reads: "Congress shall make no law...abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances".[20] Such is the federal constitutional guarantee; however, as was mentioned in the preceding chapter, this amendment serves simply as a check on the *Federal Government.*

In that case, how is one protected against State interference? First, in every State constitution, this precious right is guaranteed in some way or other.[21] Moreover, in defect of State guarantees, the Fourteenth Amendment to the Federal Constitution may be invoked. Under its "privileges" clause as well as under its "life, liberty or property" clause, this right of free speech is protected.[22] No less an authority than former Chief Justice Taft voiced this opinion, when he said: "It is sufficient to say that it [the Fourteenth Amendment] vests in the National Government the power and the duty to protect, against the aggression of a State, every person within the jurisdiction of the United States in most of the personal rights, violation of which by Con-

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18. Beard, C. A., *American Government and Politics,* p. 36.

19. Taft, W., *Popular Government,* p. 99.

20. Cf. *Constitution of the United States of America*: First Amendment (in part).

21. Which see.—Cf. Lapp, J., *The American Citizen,* p. 33; *America,* 22::23 (March 27, 1920), p. 529.

22. Cf. *Constitution of the United States of America*: Fourteenth Amendment.

gress is forbidden in the first eight amendments to the Constitution''.[23]

Finally, there are the various court decisions, furnishing ample legal documentary proof that free speech is a postulate of American Government. Thus, e.g., in Schaefer *v.* United States, 251 U.S. 474, the opinion of the court in reference to ''freedom of speech and of the press protected by the Constitution of the United States'' was succinctly this: ''That freedom of speech and of the press are elements of liberty all will acclaim''.[24]

ARTICLE III — EXTENSION OF THIS RIGHT

UNLIMITED? Freedom of speech, we have proved, is a sacred inalienable right, founded on the natural law and guaranteed by the Constitutional Law of the land. Can one, therefore, logically imply that liberty of utterance is unlimited, that one has a right to say and is protected in saying whatever he pleases? Although some, in point of fact, maintain so, yet others, viewing the subject sanely, make it clear that this right is by no means unlimited.[25]

Free speech is nature's gift, and, therefore, God-bestowed. Could one imagine anything more preposterous, than for an all-wise and omnipotent God to give to His creature the means with the right to use that means to offend Him? Use is one thing, abuse quite another, and that is just the case with free speech. Free speech, after all, is a means, not an end.[26] It was given to man by God, so that man might work out his earthly welfare and

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23. Taft, W., *Popular Government,* p. 128.

24. Schaefer *v.* United States, 251 U.S. 474.

25. Cf., e.g., Ryan, J. A., ''The Attitude of the Church towards Free Speech'' in *The Catholic Historical Review,* New Series, Vol. VIII, No. I (April 1928), pp. 96-103.—Cf. also Hess, A., ''Is Free Speech a Right?'', *The Journal of Philosophy,* 33::16 (July 30, 1936).—Cf. Kuhn, W., ''The Communist and Freedom of Speech—Notes on the constitutional control of radicals'', *America,* 56::4 (October 31, 1936), pp. 79, 80; also an editorial entitled ''Free Speech'', 56::3 (October 24, 1936), pp. 61, 62.

26. Ryan, J. and Millar, M., *The State and the Church,* p. 55 (Commentary on Leo XIII's ''Immortale Dei'').

his eternal salvation. When man does not use the right to this end, he is abusing his gift. He is like one who uses the very revolver, given to him for his protection, to put an end to his earthly existence.

Furthermore, man, by abusing this right, is transgressing the law of God; in other words, he is sinning.[27] And in this sin he should incur no moral guilt, because he has a right to sin thus?[28] On top of all this, the State should come in and guarantee this abuse under the guise of liberty? Such a policy to say the least is equivalent to issuing permits for crime![29]

Only the most illogical and depraved of men could advocate in principle unlimited freedom of expression. Yet such men, such advocates exist; they argue variously, though according to three basic patterns. In the first place, they argue, liberty cannot be limited without being lost, and liberty must never be lost at any cost. To this effect an Episcopalian minister once said: "I would rather see the press free than clean, if to clean it we had to assail liberty".[30] The defect of such advocates is that they do not understand what true liberty is; they identify liberty with license, whereas St. Thomas remarks: "...non posse peccare non diminuit libertatem....Unde Augustinus dicit in eadem epistola, quod 'felix necessitas est quae in meliora compellit' ".[31]—Their second argument resolves itself down to the contention that it is impossible to distinguish truth from error, good from evil, and that in the course of time truth and good will eventually triumph over error and evil. But what is this, but professing agnosticism and needlessly permitting error and vice to flourish to the detriment of the superior rights of truth and virtue?—The third argument propounded by advocates of unlimited freedom of speech is by far the strongest, and is in practice tenable. They argue that to permit unlimited freedom of speech is but to choose the lesser of two evils, that more good re-

27. St. Thomas, *Summa Theologica,* I Q. LXII, Art. VIII ad 3.
28. *The Holy Bible* (Douay Version), James, III.
29. Leo XIII, "Immortale Dei"; "Libertas, praestantissimum".
30. Cf. *America,* 12::18 (February 13, 1915), p. 442.
31. St. Thomas, *Summa Theologica,* II-II Q. LXXXVIII, Art. IV ad 1.

sults from tolerating than from suppressing abuse of this sort. If, in point of fact, such is the case (which is very doubtful) then, they have St. Thomas on their side, for he says: "Sic ergo et in regimine humano illi qui praesunt, recte aliqua mala tolerant ne aliqua bona impediantur, vel etiam, ne aliqua mala pejora incurrantur".[32] Such a policy can be dictated only by expediency; in principle, it cannot be justified, for it is license and not liberty.

Such is the moral aspect of the case. If one is to judge from various War time laws in particular[33] (uncalled for and unjustifiable[34] as they might have been) and from Supreme Court decisions both State[35] and Federal,[36] one is forced to the conclusion that before the law persons living in the United States enjoy no such right of unlimited expression. The Supreme Court decision in the famous Gitlow case of 1925 serves well to illustrate this point. The gist of this, as well as of all our other legal testimony in this regard, was that every constitutional right implies responsibility, that if one is allowed to say what he pleases, it is because he is held personally responsible for what he utters, and that at no time, may he "abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace".[37]

LIMITED Free speech, therefore, morally and legally considered, is limited. But how and how far

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32. *Ibid.*, II-II Q. X, Art. XI.

33. E.g., the Sedition Law of 1798; and the Espionage Act of June 15, 1917 (40 Stat. 217), and as amended and amplified by the Act of May 16, 1918 (40 Stat. 219).

34. Cf. Burdick, C., *The Law of the American Constitution, Its Origin and Development,* pp. 355-370—Ryan, J. and Millar, M., *The State and the Church,* p. 58—Cf. also, e.g., *America,* 36::4 (November 6, 1926), p. 78—For the opposite view, cf., e.g., John O'Brian's *Civil Liberty in War Time,* pp. 19 ff.

35. E.g., the Supreme Court of Illinios decision in the Chicago Ordinance Case of 1907.

36. E.g., Jackson, *Ex parte* (1877) 96 U.S. 727; Gitlow *v.* People of New York 262 U.S. 652; etc.

37. Gitlow *v.* People of New York 262 U.S. 667 (Cf. *America,* 37::7, p. 151 for May 28, 1927)—Cf. also *America,* 33::10 (June 20, 1925), pp. 220, 233, 234.

is it limited? Theoretically the problem presents little difficulty; yet the principles laid down for its solution can be at most general and merely directive, circumstances of time and place and manner necessarily altering the case.

Like all other rights, that of free speech is limited:[38] (1) By the end for which it was created; (2) By one's duty to respect the rights of others. Now, the end of every right must be morally good or at least indifferent, for every right strictly so-called is based ultimately on the Eternal law.[39] Hence, nothing at variance with the Eternal Law could be claimed in virtue of the right of free speech, as that would be not only outside the pale of right but also diametrically opposed to it.

In the second place, the exercise of one's right of free speech (although it have as object something morally good or at least indifferent) might impair (at least apparently) the equally just rights of others. Are the rights of one, to do violence to the rights of others? But right is a moral, *inviolable* power.[40] What, then, is to be done? First, it may be remarked that such a conflict of rights can be apparent only, for God is the universal all-wise Architect and He could not have given to individuals mutually conflicting rights, rights that are inviolable and at the same time violable. Yet, it may happen that in the righteous expression of one's opinion evil is done to another. In that case, what is to be done? Simply this, that in an apparent conflict such as this, the principles laid down in the first chapter[41] must be followed, namely: (1) A right, based on a higher law, more genuine as to title, and more necessary to the common good, must prevail over another not so qualified; (2) A right concerned about matter, nobler, more necessary and universal, must prevail over another less so; (3) One must have due regard for persons, for their respective dignity and their relation to him.

Such is the theoretical solution of the difficulty. The practical

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38. Cf. C. I, Art. IV Properties of Rights, "Limitation".—Cf. Le Buffe, F., *Outlines of Pure Jurisprudence*, p. 91.

39. St. Thomas, *Summa Theologica*, I-II Q. XCIII, Art. III.

40. Cf. C. I, Art. I Definition of Right, "Right as a Moral Faculty".

41. Cf. C. I, Art. IV Properties of Rights, "Collision or Conflict".

solution involves besides, a discerning of the facts as they really are and an unbiased and prudent judgment in accordance therewith. Hence, the necessity of choosing competent and honest men for the judiciary. To do so is wiser and safer than to put restrictions in the laws themselves, for legal restrictions can be arbitrarily and tyrannically applied and enforced. Such a policy is neither liberalism nor dogmatism, but rather the golden mean, for it is more expedient to put the liberalism in the law and suffer the dogmatism in the interpreter, than to put the dogmatism in the law and suffer the added dogmatism in the executor.[42]

SOME PRACTICAL RULES: As the subtitle of this section clearly indicates, an exhaustive list of actions, outside of or contrary to the right of free speech, is not here aimed at. Casuists and moralists are more competent to draw up such a list under some such title as "Sins of Speech". As the modern State is constituted, it is neither fit nor competent to legislate minutely on morality; besides, it is often governed by expediency rather than by strict principles of morality. Hence, the choice of subject matter under this heading is very limited.[43]

I RELIGION First, in the domain of religion, (as was previously pointed out),[44] free speech must be accorded within the reasonable limits of public decency and the peace of the political and social orders.

II MORALITY a) UNJUST DEFAMATION Second, in the domain of morals, so closely allied to that of religion, an almost similar policy of toleration must often be pursued. However, there are certain systems of morality, manifestly repugnant to the natural law and the righteous conscience of the majority of the people, that must never be tolerated, still less propagated, under the aegis of a right. Moreover, free speech may be abused, not only by disseminating manifestly

42. Ryan, J. and Millar, M., *The State and the Church*, p. 58.
43. This dissertation deals solely with *civic* right.
44. Cf. Chapter III.

immoral doctrines, but also by directly attacking the rights and claims of others. Against attack of this kind the commonwealth must be protected, either in virtue of a right based on justice or of a claim founded on charity or on some other virtue. In the United States, principally two such protections are accorded, not to mention others which will be subsequently treated under different headings.[45] The two, in question here, are concerned about defamation and public indecency.

St. Thomas[46] and others[47] after him define unjust defamation (or detraction in general) as the "denigratio alienae famae per verba occulta",[48] or, as it might be rather freely rendered in English: the unjust injuring of another's reputation. Now, reputation may be defined as the good opinion people have of a person.[49] That an unjust injuring of one's reputation constitutes moral wrong-doing is evident. In fact, next to life, reputation is the most precious of terrestrial possessions, for as "The Book of Proverbs" expresses it: "A good name is better than great riches".[50] St. Thomas is even more emphatic: "Auferre autem alieni famam valde grave est, quia inter res temporales videtur fama esse pretiosior, per cujus defectum impeditur homo a multis bene agendis".[51] Acquired by personal effort or at least by heredity, reputation like property is inviolable, it is a right based on justice. Just as any unjust injury of property is prohibited, so any unjust violation of reputation is forbidden. The Angelic Doctor maintains that to injure another's reputation is *ex suo genere* a mortal sin not only against justice[52] but

45. E.g., certain judicial rights (Cf. Chapter VI).

46. St. Thomas, *Summa Theologica,* II-II Q. LXXIII, Art. I.

47. Billuart, *Summa Sancti Thomae,* "Detractio est injusta denigratio famae per occulta verba" (*Tractatus de Jure et Justitia,* Diss. XV, Art. II no. 1)—Albertus Magnus, *Opera Omnia,* 38 Vol., Parisiis, 1880-1899 (*Summa Theologica,* II Q. 117, Met. II Art. I).

48. "occulta", i.e., not in the defamed person's presence.

49. Pruemmer, D., *Manuale Theologiae Moralis,* Vol. II, p. 166: "...communis (sermone prolata) aestimatio de alicujus excellentia."

50. *The Holy Bible* (Douay Version), Proverbs, XXII, 1.

51. St. Thomas, *Summa Theologica,* II-II Q. LXXIII, Art. II.

52. *Ibid.*

against charity[53] as well.

But in what does such a violation consist and may such a violation ever be justified? The question is twofold, the one part involving the solution of the other. Moralists[54] ordinarily distinguish two kinds of defamation: calumny and detraction strictly so-called. Calumny consists in imputing[55] to another defects he has not or accusing[56] him of faults he has not committed; detraction, on the other hand, consists in unjustly revealing[57] hidden defects which another really has or secret faults which he has really committed. Although the one is contrary to truth and the other founded thereon, both have the same end and effect, namely, the defamation of one's neighbor. Hence, both are forbidden by the moral law. However, while calumny can never be justified, because it is intrinsically evil inasmuch as it is opposed to verity;[58] on the other hand, simple detraction or the revelation of a hidden defect or fault may at times not only be righteous but also exacted by duty. St. Thomas asserts: "Et si quidem verba per quae fama alterius diminuitur, proferat aliquis propter aliquod bonum necessarium, debitis circumstantiis observatis, non est peccatum, nec potest dici detractio".[59] In this quotation from the Angelic Doctor, two expressions are noteworthy. First, St. Thomas says: "aliquod bonum necessarium", which may mean the public or merely the private good, whether the latter be that of one's neighbor or of the guilty person or even one's own;[60] second, St. Thomas observes "debitis circumstantiis observatis", which would rationally seem to imply: (1) that the intention must be righteous; (2) that only those persons

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53. St. Thomas: (a) *Summa Theologica,* II-II Q. LXXIV, Art. II ad 2: "...fama est dispositio ad amicitiam et infamia ad inimicitiam"; (b) *Summa Theologica,* II-II Q. LXXIV, Art. II ad 3: "...ille qui detrahit fratri, in tantum videtur detrahere legi, in quantum contemnit praeceptum de dilectione proximi."

54. E.g., Pruemmer, D., *Manuale Theologiae Moralis,* Vol. II, pp. 167 sqq.

55., 56., 57. The words, "imputing", "accusing", and "revealing", are very comprehensive and embrace any action that implies them.

58. Denzinger, H., *Enchiridion Symbolorum* etc., no. 1193 et no. 1194.

59. St. Thomas, *Summa Theologica,* II-II Q. LXXIII, Art. II.

60. Pruemmer, D., *Manuale Theologiae Moralis,* Vol. II, p. 172.

should be informed, that must be informed, in order that the evil may be avoided or the good promoted; (3) that it be probable that more good result than evil; (4) that the evil to be removed or the good to be promoted be of some importance.[61]

A third and final question that naturally arises here is the reparation of the injury that was done. Morally considered, justice demands that the unjust defamer repair as soon and as completely as possible the injury that was done, as likewise make restitution for all the material damage that might have resulted and that he might have, at least in a general way, foreseen. Ancient[62] and modern[63] moralists alike oblige him to do so, unless he is justly excused by some legitimate reason, e.g., forgiveness.[64] While superiors are obliged out of charity and piety to exact that reparation be made by the defamer to the defamed, still strict justice does not oblige them to act thus unless appealed to. This is the doctrine of Lugo[65] and Pruemmer.[66]

Such is the moral aspect of the question. Legally considered, it is in a general way covered by libel and slander suits in civil and criminal litigation. However, legal action falls short at times, especially in this respect that, in civil law proceedings, proof of the truth of the statement or that it was a privileged communication or a fair comment or the like justifies defamatory utterances. Criminal law exacts in addition the proof that the communication was for the public benefit and for justifiable ends.

II MORALITY
b) PUBLIC INDECENCY

As for public indecency, much might be said. However, this is not the place to say it, but merely to outline the fundamental principles covering it:—St. Thomas defines scandal as

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61. Cf. 1915 Taurini (Italy) Edition of the *Summa Theologica* of St. Thomas, footnote to Art. II of Q. LXXIII, II-II.

62. St. Thomas, *Summa Theologica,* II-II Q. LXII, Art. II ad 2; Q. LXXIII, Art. II.

63. Pruemmer, D., *Manuale Theologiae Moralis,* Vol. II, pp. 174, 175.

64. *Ibid.,* Vol. II, p. 175.

65. Lugo, J. de, *Opera Omnia,* 8 Vol., Parisiis, 1868-1891, "De just. et jure disp.", 14, n. 131 sqq.

66. Pruemmer, D., *Manuale Theologiae Moralis,* Vol. II, p. 174.

"...dictum, vel factum minus rectum, praebens [alteri] occasionem ruinae"[67] [i.e., ruinae spiritualis]. In the subsequent article,[68] the Angelic Doctor goes on to say that it is always a sin against charity, for one thus to act whether he cause the spiritual ruin *per se* or *per accidens*. Just as one cannot be justified in causing injury to another's property or reputation, so one cannot be justified in causing injury to another's soul. Man is bound, in virtue of the precept of charity,[69] to love his neighbor. Now, what is his neighbor's dearest treasure if not his soul? Rightly, then, does the Savior flay the scandalizer in terms unmistakable and severe: "But he that shall scandalize one of these little ones that believe in me, it were better for him that a millstone should be hanged about his neck, and that he should be drowned in the depth of the sea".[70]

Public indecency, i.e., lewd talk, pornographic literature, obscene statues and pictures, undressed and licentious plays, etc., is for the average person an occasion of spiritual ruin. Now, charity demands that one's actions and words be not an occasion of sin to others. Even the pagans of old realized this and considered it the serious duty of the State to legislate on this matter. Aristotle says: "Indeed, there is nothing which the legislator should be more careful to drive away than indecency of speech."[71] Nor does he stop here; rightly does he include within the censure, statues, paintings and shows of the same obscene nature.[72] St. Thomas evidently advocates the same policy in his commentary on the passage.

But is not this difficult to legislate on? What is bad for one, might not be bad for another. The objection is true, as far as it goes. But the fact that the line cannot be drawn with precision, does not say that it should not be drawn at all. Safeguards must be instituted, extremes avoided. Equally reprehensible is it to ar-

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67. St. Thomas, *Summa Theologica*, II-II Q. XLIII, Art. I.
68. *Ibid.*, Art. II.
69. *The Holy Bible* (Douay Version), Matthew, XXII, 39.
70. *Ibid.*, XVIII, 6 ff.
71. Aristotle, *Politica*, VII. 17 (Ross).
72. *Ibid.*

gue like the one who wished to purge the Bible of the killing of Abel for fear that it might prove of bad example to others; or, on the other hand, to advocate licentiousness of expression under the specious guise of art or of life. The golden mean lies between; righteous and prudent legislators will discern and follow it. Such, to a certain extent, has been and is actually the policy in our American Commonwealth. Postal laws[73] and local legislation of various kinds clearly testify that the First Amendment to the Federal Constitution and the Free Speech guarantees in the State Constitutions or Bills of Rights do not legalize indecent expression. Liberty of speech, as interpreted by the law of the land, does not extend to license of utterance. The laws, safeguarding the national sense of decency, while they are far from perfect, nevertheless, exist and prove at least that free speech may not be interpreted as unlimited when decency is at stake. One has a right to free speech, but not a right to injure the just rights and claims of others.—So much for the subject here; special problems, in regard to it, will be treated later on in the chapter.

III **ECONOMICS** In the domain of economics, speech must be accorded freer reins than in those of religion and morality. Economic problems may be divided into two general classes: those with a manifestly moral aspect, and those with no apparently moral consequences. Naturally, the first class must be treated largely like purely moral problems. In principle, no theory which is not in accord with sound morals (as for example certain theories of wage justice[74]), should be tolerated; in practice, however, expediency may dictate otherwise. As for the other class of economic problems, i.e., those with no appar-

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73. Cf. Burdick, C., *The Law of the American Constitution, Its Origin and Development,* pp. 339-341, 370-373—For example, obscene matter and articles adapted or designed for immoral purposes are barred from the mails. For the practical results accruing from such legislation, as also for its occasional inconsistencies, cf., e.g., *America,* 35::8 (June 5, 1926), p. 186.

74. E.g., The Prevailing-Rate Theory, Exchange-Equivalence Theories and The Productivity Theories (cf. Ryan, J. A., *Distributive Justice,* New York, 1925, pp. 323 ff.)

ently moral consequences, freedom of promotion must be accorded them. After all, most economic questions are of an uncertain solution; one theory cannot ordinarily be proved to be untenable and socially and economically disturbing and injurious, no more than another theory can be proved with equal assurance to be the panacea of all economic ills. Except for those theories, that are manifestly immoral or subversive of our basic economic institutions, free speech in this domain should be granted.

IV POLITICS The principles, that hold good with regard to economics, may be applied also to politics. Of course, there are certain basic principles of government; but aside from them one political theory is often as good as another, or for that matter as harmful as another. Ordinarily, no infallible verdict can be reasonably passed on them. Evidently the spread of any political doctrine manifestly opposed to the moral law or subversive of governmental institutions by illegitimate means should not be tolerated. At least, so it is in theory; in practice, expediency may dictate otherwise; prudent and righteous legislators will act accordingly.

ARTICLE IV — A SPECIAL PROBLEM OF UNLIMITED FREE SPEECH

OUR GREAT PROBLEM: THE EXPLOITATION OF THE INDECENT The free speech problem in the United States is not so much the procuring as the limiting of free speech within reasonable bounds. Moreover, the most vital phase of this problem seems to be the curbing of the exploitation of the indecent. The principles governing it have already been outlined;[75] the practical carrying out of them still calls for consideration.

FALSE DISGUISES: In the attempt to check this exploitation of the indecent, one is usually met with the following objections: (1) "Art for art's sake"; (2)"It's

75. Cf. Above, "II Morality: b) Public Indecency".

true to life"; (3) "We give the people what they want". A brief consideration of each of these will reveal their fallacious character and suggest ways of dealing with them.

1 — "ART FOR ART'S SAKE" Art may be defined as the expression of beauty in form, color, sound, speech or movement.[76] Its field is commensurate with that of beauty and depends on one's conception thereof for its complete understanding. But what is understood by the beautiful? St. Thomas says: "...ad pulchritudinem tria requiruntur; primo quidem integritas sive perfectio, quae enim diminuta sunt, hoc ipso turpia sunt; et debita proportio, sive consonantia; et iterum claritas. Unde quae habent colorem nitidum, pulchra esse dicuntur".[77] Such are, what might be called, the objective factors of beauty, which every work of art must comprehend to be worthy of the name. However, there can be no doubt that subjective factors also must be reckoned with. A work of art could never be realized, nor appreciated, if the personal element in the artist or the connoisseur would have to be prescinded. A work of art affords a person aesthetic pleasure, because he perceives a certain orderly arrangement, a certain unity in variety, which demonstrates its perfection, and, in turn, results in its clarity or its power of appeal; but what is all this if not a comparison between the objective reality and one's personal, individual idea thereof? That is why a work of art pleases one and leaves another unmoved. The subjective factor is involved and thereon hinges the crux of the question.

Art appeals not merely to the mind but also to the emotions. It arouses the imagination and stirs the passions. Passions, as the Angelic Doctor remarks,[78] are the principles of actions. When one is moved, one is moved to act, and if that act is not in conformity with God's laws, one cannot justify the cause that so moved him. Art for art's sake is true, when its immediate end or objective factors alone are considered; a work of art must

76. Cf., e.g., *Webster's New International Dictionary*, 1935.
77. St. Thomas, *Summa Theologica*, I Q. XXXIX, Art. VIII.
78. *Ibid.*, II-II Q. LVIII, Art. IX ad 2.

certainly conform with all that is required of it to be such. Yet, it must be remembered, there are also subjective factors in the artist and in the connoisseur, factors that posit a movement of the passions, and thus bring it, like all other human acts, within the domain of the moral law. All are bound, one and all, artist and simple tradesman, by God's immutable laws. When art arouses good aspirations, it is moral; when it arouses evil aspirations, it is immoral. Naturalism would fain divorce art and morality, with the inevitable result, a base descent to crude naturalism and sensuous pleasure. The artist cannot be justified in being the cause of spiritual ruin to another, no more than he can be excused from taking that person's life; he is bound by God's laws in all his actions, whether in the domain of art or not.

"Art for art's sake", therefore, would be true if one could abstract from the personal element; this, however, not being the case, the motto must be reconstructed into some such formula as the following: "Art for art's sake, but always within the reasonable bounds of the moral law". What those bounds are, every one knows, namely, that art must never be the proximate occasion of sin to others; in practice, the individual reaction may vary. What incites one to sin may not incite another and vice versa. However, when art has for object scenes obscene in themselves or the glorification of the adult nude, it can hardly be gainsaid, that for the average person[79] such "art" (if it may be so called) is immoral and forbidden.

To what extent this motto "Art for art's sake" has been abused, is only too well known. As long as this philosophy of Naturalism obtains, so long will men wallow in the mire of sensualism and sin. The severance of art and morality has no place in any reasonable system of creed and conduct; art and morality are intimately united. "Art for art's sake" can never justify the violation of the moral code. *Morality is above art, not art above morality.*[80]

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79. Pruemmer, D., *Manuale Theologiae Moralis*, Vol. I, p. 428.

80. As regards the subject "Art for Art's Sake", cf., e.g., Mercier, D., *A Manual of Modern Scholastic Philosophy*, Vol. I, pp. 564 ff.; Gietman, G., "Aesthetics", *The Catholic Encyclopedia*, Vol. I, pp. 174 ff.; *America*,

11—"IT'S TRUE TO LIFE" The second fallacy, under which the producers of the indecent would fain take refuge, is their contention that the questionable production is true to life. If their contention be true, then one may justly fear for America, for if one is to judge from the pornographic literature and the lurid (film and) stage features that claim to represent American life and character, then one must conclude that Americans, one and all, revel in forbidden things. Marital infidelity, divorce, feverish desire for and licentious enjoyment of the immoral, etc., seems to be a part of every American's life, —if the American magazine, (movie), stage, etc. are true to life. The fallacy in all of this lies in the fact that the salacious scene is "true to life", the way the producer sees it; in reality, however, it is but the exceptional in life, not life's rule that he depicts. Perhaps this misrepresentation of American life results from the so-called code of ethics employed by producers with a view to furnish at all times the sensational, no matter what the monetary or moral cost. The now "classic" rule and mandate of the editor of one of the country's reputable metropolitan newspapers is typical: "If a dog bites a man that is not news, if a man bites a dog that is news".[81] This is in substance the basic fault of many "literary" productions, plays, (films), etc. at the present day; the plain, simple and good living American affords no theme for production, the exceptional is what is sought and exploited. Naturally, a false idea of life in general (although true in individual cases) is imparted.

Moreover, the fact, that a given lurid work is true to life, can be no justification for its production. It is again, like anything else that is morally dangerous, an occasion of sin to others and, therefore, forbidden by the moral code.

32::21 (March 7, 1925), pp. 485 ff.; Vivas, E., "Art, Morals and Propaganda", *The International Journal of Ethics,* Concord, 46::1 (October 1935); cf. also Sailer, *Théologie Morale,* Tome III p. 180 et suiv. (Morale des artistes).

81. *The New York Times.*

III—"WE GIVE THE PEOPLE WHAT THEY WANT"

The third excuse, advanced in justification of the exploitation of the indecent, is "We give the people what they want".[82] This, like its two sister fallacies, is, at most, a half truth. If the so-called "check-up" for the month of September 1924 (to take an ante-Legion of Decency example) can be taken to prove anything, one must conclude that "a large portion of the screen audience does and will patronize good films".[83] This "check-up", the result of questionnaires answered by 8,600 exhibitors relative to 265 productions, shows that the clean wholesome film is patronized more than the widely and brazenly advertized sex film. True, people will flock to what is indecent, but that is no proof that they want it; in fact, the statistics above and many since the advent of the Legion of Decency would prove the contrary. Give the people what is wholesome and they will patronize it; give them what is indecent and they will come also though they depart wiser and sadder. The trouble is, many people desire distraction at any cost, and, the wholesome lacking, the indecent must satisfy the want. Then, again, many people are led to the lurid exhibition for the simple reason that they do not know what they are getting before they enter. They are out to enjoy themselves; if the production is good, so much the better; if it is not, well, they must distract themselves anyway, they reason.—What is true here of the movie is equally true of the stage and the printed page.

But aside from all this, even if granted that producers are giving the people what they want, they cannot be justified in so doing. If a child of four or five asks for a loaded revolver, will his mother give it to him because he desires it? Or if a person asks for a rope to hang himself, will his friend proffer it to him because he requests it? Certainly not, for never may one be the proximate occasion of spiritual ruin to another or cooperate for-

82. Thus, we read in *America*, 36::8 (December 4, 1926), p. 174: "Whatever rules it follows or dispenses with, the modern newspaper feels itself bound to give the people what the people demand."

83. Cf. *N.C.W.C. Bulletin*, Washington, D.C., 6::5 (October 1924), pp. 18, 19, "Box Office 'Check-up' of the Movies" by Charles Gainor, O.P.

mally in his sin, or even materially without a serious reason.[84]— Yet, it may be objected that the exploitation of the indecent is not a proximate occasion of sin. That it is not, is hard to be convinced of, when one remembers man's corrupted nature. Nor does it take a theologian like St. Thomas[85] to say that the publication of crime leads to the multiplication thereof, for the poet says:

> "Vice is a monster of so frightful mien,
> As, to be hated, needs but to be seen;
> Yet seen too oft, familiar with her face
> We first endure, then pity, then embrace."[86]

THE SOLUTION OF THE PROBLEM

Since the case of the producer of the indecent is fallacious, the course of his nefarious wantonness in corrupting the minds and souls of people may and must in all justice be checked. But it may be asked: How can it be checked and how most effectively?[87]

Taken abstractly, aside from, e.g., the admirable results achieved by the Legion of Decency, two modes of procedure suggest themselves. The procedure generally proposed is censorship. Prominent and sincere though the advocates of censorship may be, censorship is not only un-American but also untenable, except as a last resort to avoid greater evils.[88] Where, indeed,

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84. Pruemmer, D., *Manuale Theologiae Moralis,* Vol. I, pp. 429 sqq.

85. Cf. St. Thomas, *Summa Theologica,* II-II Q. XXXIII, Art. VII—Cf. also Beck, *America,* 36::18 (February 12, 1927), p. 424.

86. Alexander Pope, "An Essay on Man".

87. Many are of the false impression that, previous to the advent of the Legion of Decency, these problems were not thought of or agitated. Yet the contrary was the case; thus, in *America* alone in the first half of the year 1927, we find the following references anent the subject: On the theatre:—36::21 (March 5, 1927), pp. 494-495; 36::25 (April 2, 1927), p. 605; 37::1 (April 16, 1927), p. 5; 37::4 (May 7, 1927), p. 79; On literature:—37::1 (April 16, 1927), pp. 13-14; 37::5 (May 14, 1927), p. 118; 37::6 (May 21, 1927), pp. 125-126; 37::13 (July 9, 1927), p. 294.

88. Cf., e.g., Paul L. Blakely, *America,* 24::26 (April 16, 1921), pp. 618 ff.; Chas. A. McMahon, *N.C.W.C. Bulletin,* 6::7 (December 1924), p. 20; Edward Garesché, *America,* 35::3 (May 1, 1926), pp. 63-64.—In fact, this

is one's liberty (so proudly boasted of as an American heritage), if one must submit beforehand what he is going to express whether on the screen or on the printed page or elsewhere? One's freedom of speech is thereby seriously impaired and limited; such limitation does injury to one's right founded in nature and guaranteed by the supreme law of the land. The fact that a person might choke himself is no reason for cutting off his hands. And yet this must not be interpreted universally, for the condemnation of censorship in principle does not preclude censorship in practice, and, of course, not censureship. In fact, if censorship is condemned, it is for the simple reason that censureship is advocated,[89] for, all other things being equal, one should be punished for the abuse that he makes of a right rather than hampered in the free exercise thereof. However, the words "all other things being equal" are to be noted, for it may happen sometimes that censorship is not only justifiable but also desirable. As former Governor Miller of New York once said:[90] "Censorship is a thing to be avoided unless some greater evils result by its avoidance". And this is in substance the contention of the author: Do not censor but rather censure and that severely; if, however, censureship and other means should prove ineffective, institute censorship but then only to avoid a greater evil.

Censorship and censureship are two modes of procedure for curbing the exploitation of the indecent; a third, more efficient though slower, is possible. The writer penned the present paragraph some ten years ago. In the light of the results achieved, e.g., by the Legion of Decency, it takes on added force. The point is this: After all, if one is sincere, are not the American people themselves responsible for the continuation of the dissemination of filth? Producers, as it is only too well known, are out after the money. If the American people would carry on a concentrated effort to affect the producers' receipts, would the producers not change their tactics? But how are we to affect them?

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has been the philosophy of the Legion of Decency.

89. Cf., e.g., *America*, 36::16 (January 29, 1927), p. 372.

90. Quoted in *N.C.W.C. Bulletin*, 2::9 (May 1921), p. 13.

Very simply, either by influencing the producers directly, i.e., personally or through various organizations, cooperating with them when good and working against them when evil; or by making our influence felt at the ticket office, the bookstand, etc. The latter is by far the more effective method, for if the good is patronized and the evil boycotted, the people's verdict will be soon heeded. Catholics alone constitute twenty percent of the movie population in the United States to take an example from the screen world. Such an organization alone with concerted action could do much to clean up a very filthy situation. The trouble, however, is that most people are ignorant or indifferent. To inform them in advance of the good and of the evil, and to arouse their earnest cooperation is, indeed, a difficult task. The rest will naturally follow:—Lack of patronage, change of method; continuance of patronage, continuance of method. As soon as people realize their responsibility and their latent power, just so soon will the situation be effectively cleared up. However, it must be noted that the contention is not that the people are corrupting the producers, but rather the contrary, and that the best way to check this is by influencing the cash drawer.

In conclusion, we maintain that if on the one hand *censorship* has failed, it is because in principle it does violence to the right of free speech; and that if on the other hand *censureship* has failed, it is because it can never effectively repair the wrong that has been done. The only ideal way, therefore, to check the exploitation of the indecent would seem to lie in the interior conversion and purification of the vendors thereof.

CHAPTER V

FREEDOM FROM SEARCH

ARTICLE I — DEFINITION OF THIS RIGHT

INTRODUCTION "Freedom from search" is the term that is used to describe the third right guaranteed to all people living within the confines of the United States. Although the term appears at first consideration to be quite limited, yet as a matter of fact it is quite comprehensive. It may be useful, therefore, at the very outset to define it and give the reasons for employing it.

DEFINITION OF THE RIGHT By the right of freedom from search is generally[1] understood the right guaranteed in the Fourth Amendment to the Federal Constitution and described therein as follows: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[2]

In the first place, one is assured security in his person, house, papers and effects,—in short, in all that he is and holds dear. Whether he be at home or abroad, whether the interference, to which he is subjected, affect his very person or merely his property, he is protected in virtue of this Fourth Amendment.

In all these, the amendment asserts, a person is to be secure "against unreasonable searches and seizures".[3] It is well, however, to note the word "unreasonable", for, although arbitrary seizures and searches are forbidden, absolute inviolability is not assured. Only unreasonable, unjust interference is prohibited.

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1. Cf. e.g., Lapp, J., *The American Citizen,* New York, 1924, p. 34.
2. *Constitution of the United States*: Fourth Amendment.
3. *Ibid.*

Thus, in virtue of the right, one may claim immunity from any unjust violation of the hearth or undue seizure or search abroad. But from reasonable search and seizure one may claim no such immunity. Now, by reasonable search and seizure (if one is to judge from the spirit of the law and from precedent in the past) is understood a search or seizure in virtue of a warrant or writ rightly issued; or even an arrest, whether by a private individual or by an officer of the law, of a person in the act of committing a crime. Moreover, an officer may arrest a person whom he has good reason to believe to be guilty of a crime, as may also a private individual seize one whom he suspects of committing a capital offense.[4] All this would still be considered reasonable. What the right is intended to protect is personal and domiciliary inviolability against any arbitrariness on the part of officious or malicious officers and individuals, who would search and seize on mere suspicion and thus unduly interfere with one's personal liberty and happiness, founded on the natural law and so highly acclaimed in the Declaration and the Constitution.

In all cases other than those noted above, search or arrest warrants must be issued. In this respect the Constitution says: "no warrants shall issue, but upon probable cause, supported by oath or affirmation".[5] To require more were to stop the wheels of justice and permit criminals to roam almost at will; to exact less were to jeopardize unreasonably the good name, person and effects of the accused. The words "probable cause", however, are to be noted, as all "rumor, suspicion, or guesswork"[6] are thereby excluded. Moreover, the "probable cause" must be "supported by oath or affirmation". Humanly speaking the law can ask no more. Only when the magistrate thus feels morally assured of the veracity and the probability of the charge, is he justified in issuing a warrant of arrest, a search warrant or a writ of attachment[7] or replevin.[8]

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4. Baldwin, S., *The American Judiciary*, New York, 1905, p. 227.
5. *Constitution of the United States*: Fourth Amendment.
6. Cf. Veeder *v.* United States (1918) 252 Fed. 414, 418.
7. A writ authorizing the sheriff to seize property.

Nor is this the full extent of the protection that is accorded by the amendment. Not only may warrants issue upon "probable cause", "supported by oath or affirmation", but they must also particularly describe "the place to be searched and the persons or things to be seized".[9] Wisely did the framers of the Fourth Amendment (adopted in 1791) insert this particular clause. Had not they and their forebears already had sad experience of the contrary action in the days before the Revolution when the British issued the so-called "writs of assistance", which were mere general arrest warrants or rather blanks into which each and every petty officer could insert the name of whomever he pleased and arrest him? Under this provision of the Constitution, our ancestors wished to prohibit all such general warrants. In consequence, each writ must expressly mention the place to be searched and the persons or things to be seized; it is not left to the officer of the law to fill in as he pleases; the judiciary magistrate must do so. Only in this way will our constitutional right be properly safeguarded.

REASON FOR THE TERM

In short, these are the various specific guarantees that one has in virtue of the Fourth Amendment. Why they should be referred to generically as the "freedom from search" guarantees is quite apparent, for, whether the particular action in question be an arrest, a seizure or a search, the final end of it all is an inquiry into the guilt or non-guilt of the person involved or the legitimateness of the seizure or search. The arrest or the seizure is merely preparatory to this inquiry or "search". Hence, the generic term "freedom from search" is used, and means simply the immunity from the institution of any legal or non-legal action illegally brought against a person whether in arrests, seizures or searches.

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8. A writ authorizing officers to seize property and turn the same over to the plaintiff.

9. *Constitution of the United States*: Fourth Amendment.

ARTICLE II — FOUNDATION OF THIS RIGHT

MORAL FOUNDATIONS

1. General Arguments

Following the plan pursued in the two preceding chapters, the moral and the legal foundations of this right must now be investigated. In behalf of the moral foundation of this right, there are principally three arguments: Two, general, based on reason and authority; the third, more particular and specific, founded on authority though ultimately based on reason.

The first argument in behalf of freedom from search is drawn from the fact that man is by nature free. It is hardly necessary to prove the obvious, yet it may be said that consciousness testifies that I am free, that I (like all other men) may freely choose to act or not to act,[10] to choose one thing or its opposite,[11] or even select from things not opposed.[12] Moreover, people hold me responsible for what I do; I am free, else why should they hold me responsible?[13] So consciousness and the *consensus gentium* testify; Harry Elmer Barnes surely does not disprove it, by merely stating that "there is not the slightest iota of choice allowed to any individual from birth to the grave."[14]

Not only does reason attest that one is free, but authority does also. St. Thomas says: "...necesse est quod homo sit liberi arbitrii ex hoc ipso quod rationalis est."[15] With even still greater force, that of divine faith, the Council of Trent declares: "Si quis liberum hominis arbitrium post Adae peccatum amissum et exstinctum esse dixerit, aut rem esse de solo titulo, immo titulum

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10. Liberty of contradiction.

11. Liberty of contrariety.

12. Liberty of specification.

13. Coppens, C., *A Brief Text-Book of Logic and Mental Philosophy*, New York, 1891, Part II, pp. 125 ff.

14. Barnes, H., "The Case Against Capital Punishment", *Current History*, New York, 24::3 (June 1926), pp. 365-371, p. 366.

15. St. Thomas, *Summa Theologica*, I Q. LXXXIII, Art. I c.

sine re, figmentum denique a satana invectum in Ecclesiam anathema sit.''[16]

If, then, man is by nature free and is in virtue thereof *sui juris,* then he must enjoy to its fullest extent what is known as personal liberty or what Robinson defines as ''the entire freedom of a person to act or forbear''.[17] Since, however, this right is founded on nature, it must be limited also by nature, i.e., since man was created by God and made by Him to live in Society, he may exercise this liberty only in conformity with the laws of God and of Society.[18]

Now, from this one may logically conclude, that man, in as far as he is man, is free from any external coercion; as a member of Society, however, he is bound by Society's laws. Society, in turn, however, being instituted to procure the common good, may neither sanction nor promote anything detrimental thereto. Now, to permit people and their effects to be searched and seized indiscriminately by any one and that on the merest suspicion, is as much outside the State's domain in strict justice to allow, as to permit people and their effects to be absolutely inviolable to search and seizure even by duly constituted authority and despite reasonable suspicion of guilt. The one like the other is against the individual as well as the common good; one sins by defect, the other by excess; virtue, as ever, stands in the middle. Such a middle course alone can be justified, and it is just such a course that is outlined in the Fourth Amendment, an amendment that recognizes a natural right only in so far as it is subject to nature's God and to Society as instituted by Him.

The second general argument, advanced in substantiation of this thesis, is drawn from a consideration of one's ''dominium privatum''. This argument, however, in comparison with the preceding one drawn from personal liberty, is less fundamental as likewise less comprehensive; in fact, it holds merely for property inviolability and in no way protects one from personal as-

16. Council of Trent: sess. VI, cap. V (Cf. Denzinger n. 815).
17. Robinson, W., *Elementary Law,* No. 39.
18. Le Buffe, F., *Outlines of Pure Jurisprudence,* p. 90.

sault. Much has already been written on the subject, though all of it in the final analysis is reducible to principles enunciated by Thomas[19] and more amply and conclusively reiterated by Leo XIII. In his memorable Encyclical "Rerum Novarum", the illustrious Pontiff of the Working People clearly and unequivocally proves his contention that "possidere res privatim ut suas, jus est homini a natura datum".[20] In order not to go over this same field so ably treated by Thomas, Leo and others, merely the basic Catholic Doctrine on this subject is here subjoined. In short, it may be said, freedom from search is a natural right, postulated by man's individual and social nature. As an individual, man has to live and to provide duly for the future, when unemployment, accident, sickness or old age may then prevent him from doing so; secondly, as an individual, his nature craves advancement and progress, the greatest natural incentive thereto being private property. Nor does his individual nature alone postulate this right; his twofold social nature as father and citizen demand it likewise. As head of the family, he must provide duly for those dependent on him; as a citizen, he must have some incentive and assurance for caring for the things entrusted to him as well as for procuring the necessities and the superabundances of life that make for the happiness craved by his nature. Without private property, how can progress, concord and happiness obtain whether man be considered as a solitaire or as a member of domestic or Civil Society? In short, private property is something demanded by nature and, hence, in the true sense of the word a natural right.[21]

If, then, man has this right from nature, how may he in justice be unreasonably molested therein, whether the molestation be a search or a merely temporary seizure? Violation of this sort would be an infringement on his natural right of private property. Evidently, this right of private property protects one

19. St. Thomas, *Summa Theologica*, II-II Q. LXVI (especially Art. II).

20. Leo XIII, "Rerum Novarum".

21. Cf. on this subject, e.g., Le Buffe, F., *Outlines of Pure Jurisprudence*, pp. 94 ff.

in no way from personal assault; hence, it is not and cannot be advanced to prove the right of "freedom from search" in its entirety.

MORAL FOUNDATIONS
2. Particular Argument

The third argument, concerned as it is with the justification of the various phases and limits of this right, is less connected though no less conclusive. In short, it consists merely of a comparison between the various specific guarantees of the Fourth Amendment on the one hand, and the principles of St. Thomas and the Schoolmen on the other.

In the first place, the Bill of Rights guarantees security in "persons, houses, papers, and effects".[22] As was proved above,[23] man is essentially free. Now, such being the case, he must be assured freedom from molestation, whether that molestation be search or seizure. After his person, what is more sacred than his home? Do not Americans proudly insist that "every man's house is his castle"? Does not St. Thomas assert: "...domus est tutissimum uniuscujusque receptaculum, unde molestum homini est ut in domo sua invadatur"?[24] After their persons and their homes, that which most people consider closest and dearest to them as individuals (not as fathers or mothers naturally) are their papers. Papers, so to say, constitute a part of their person; they are but the written records of what is treasured in their hearts. Papers are their secret, and as such they have a strict right in justice to be secure therein. So the theologians maintain.[25] Then, as if to mention everything not included in the above enumeration, "persons, houses, papers", the amendment adds "effects". Therein is included all that one possesses and can call his own, any violation of which is prohibited by the

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22. *Constitution of the United States*: Fourth Amendment.

23. Cf. pp. 131, 132—Cf. also, e.g., Cathrein, V., *Philosophia Moralis,* pp. 273 sqq.

24. St. Thomas, *Summa Theologica,* I-II Q. CV, Art. II ad 4; cf. etiam II-II Q. LXIV, Art. VII, Sed contra.

25. E.g., Billuart, *Tractatus de Jure et Justitia,* Dissert. XV, Art. IV, Appendix—Pruemmer, D., *Manuale Theologiae Moralis,* Vol. II, pp. 162, 163.

moral code. That man has a natural right to acquire property and to possess things as his own was proved above. Moreover, as St. Thomas remarks in his treatise on private property "furtum et rapina sunt vitia justitiae opposita",[26] even if committed by public authority.[27]

With regard to all these ("persons, houses, papers, and effects"), the Bill of Rights insists, that one is to be secure "against unreasonable searches and seizures".[28] Searching, after all, is nothing more than extorting secrets. Since, however, secrets are like other things that one calls his own, to extort them from one reasonably unwilling constitutes a violation of justice.[29] Besides, searching without sufficient reason adds thereto the guilt of rash judgment or at least false suspicion. And even should this judgment or suspicion be founded, nevertheless as private individuals men are prohibited from passing on the case. "Injustum est quod aliquis judicetur ab eo qui publicam auctoritatem non habet",[30] says St. Thomas.

If searches are forbidden, still more so are seizures, for they not only fundamentally effect the same harm, but go even further by taking possession of the person or thing suspected. If seizure in general can be justified, there will be no liberty nor ownership that may not be summarily curtailed or taken away. In this case, one will have inviolable powers (as all rights are)[31] that are still in all justice violable, which, of course, is a contradiction. To imprison or detain one is illicit,[32] while to seize his possessions is equally unjust,[33] unless done according to justice. So St. Thomas teaches.

However, as the amendment declares, only *unreasonable* searches and seizures are forbidden. And this is as it should be, be-

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26. St. Thomas, *Summa Theologica,* II-II Q. LXVI, Art. IV.
27. *Ibid.,* Art. VIII.
28. *Constitution of the United States of America*: Fourth Amendment.
29. E.g., Pruemmer, D., *Manuale Theologiae Moralis,* Vol. II, p. 159.
30. St. Thomas, *Summa Theologica,* II-II Q. LX, Art. VI ad 1.
31. Cf. C. I, Art. I Definition of Right, "Right as a Moral Faculty".
32. St. Thomas, *Summa Theologica,* II-II Q. LXV, Art. III.
33. *Ibid.,* II-II Q. LXVI, Art. VIII.

cause all searches and seizures without exception cannot be categorically condemned. There are times and circumstances when searches and seizures are not only justifiable but also in strict justice necessary. As was mentioned on several previous occasions, public authority was instituted for the common welfare; on this principle hinges to a great extent the doctrine of reasonable searches and seizures. In other words, whenever searches and seizures are demanded by the common good, they must be considered reasonable, since the common good takes precedence over the private. But since it is public authority that has as "raison d'être" the procuring of this common welfare, it is public authority and public authority alone, that must authorize the searches and seizures in view thereof; no one else has a right to do so.

Such is, in general, the Thomistic doctrine on reasonable searches and seizures. Among some of the specific principles that the Angelic Doctor lays down thereon, are the following:

I a) "Principibus vero potestas publica committitur ad hoc quod sint justitiae custodes".[34]

b) "...nec judicium ferri potest nisi publica auctoritate".[35]

II "...revelare secreta in malum personae, est contra fidelitatem; non autem si revelentur propter bonum commune, quod semper praeferendum est bono privato".[36]

III a) "...incarcerare aliquem, vel qualitercumque detinere, est illicitum, nisi fiat secundum ordinem justitiae, aut in poenam, aut ad cautelam alicujus mali vitandi".[37]

b) "...secundum humanam justitiam non pro qualibet culpa homines incarcerantur sed pro aliquibus".[38]

c) "...detinere hominem ad horam ab aliquo opere illicito statim perpetrando, cuilibet licet;....Sed simpliciter ali-

34. *Ibid., loc. cit.*
35. *Ibid.*, II-II Q. LX, Art. VI c.
36. *Ibid.*, II-II Q. LXVIII, Art. I ad 3.
37. *Ibid.*, II-II Q. LXV, Art. III c.
38. *Ibid.*, II-II Q. LXV, Art. III ad 2.

quem includere, vel ligare, ad eum solum pertinet qui habet disponere universaliter de actibus et vita alterius''.[39]

IV a) ''...quicumque per violentiam aliquid alteri auferet, si sit privata persona, non utens publica potestate, illicite agit, et rapinam committit''.[40]

b) ''...non licet eis [principibus] violentia et coactione uti, nisi secundum justitiae tenorem...et quod per talem violentiam aufertur, non habet rationem rapinae, cum non sit contra justitiam. Si vero contra justitiam aliqui per publicam potestatem violenter abstulerint res aliorum illicite agunt, et rapinam committunt''.[41]

But let us come back to the amendment. It reads: ''...and no warrants shall issue, but upon probable cause''.[42] Now, these words have a twofold implication, namely, that warrants must issue and that they must issue only upon probable cause. In the first place, search or arrest warrants must issue, if search or arrest is to be legal and just. Now, this seems to be no more than a reasonable amplification of the principle cited above, namely, ''...nec judicium ferri potest nisi publica auctoritate''. But how is one to have the moral assurance that public authority has borne judgment and that the officer of the law is duly authorized to search or seize, except public authority issue a warrant to this effect? St. Thomas is very explicit on this point, for he says ''rationabiliter institutum est ut accusatio, sicut et alia quae in judicio aguntur, redigatur in scriptis''.[43]

In the second place, these warrants shall issue only upon probable cause. And this also is no more than reasonable, for otherwise magistrates could issue warrants as they pleased on the merest pretexts. But why should a person's undoubted right be thereby endangered because of the doubtful right of another (even though it be the State) to assault it? To have a bad opin-

39. *Ibid.*, II-II Q. LXV, Art. III ad 3.

40. *Ibid.*, II-II Q. LXVI, Art. VIII c.

41. *Ibid.*

42. *Constitution of the United States of America*: Fourth Amendment.

43. St. Thomas, *Summa Theologica*, II-II Q. LXVIII, Art. II c.

ion of one (as search or seizures implies) without a sufficient reason is unjust. So reason asserts, so sound theology teaches. St. Thomas says: "...ex hoc ipso quod aliquis malam opinionem habet de alio, sine *causa sufficenti,* indebite contemnit ipsum; et ideo injuriatur ei".[44] Nor does this apply merely to ordinary individuals as such, but to public authority besides,[45] bound as it is to act according to due justice in all things. Public authority is no more above the moral law, than the private individual is. Both alike are bound to respect the rights of others, unless they have reasonable cause to believe that these rights have been abused.

Not only must warrants issue upon probable cause, but this probable cause must be "supported by oath or affirmation".[46] So the amendment reads. Again, in this respect, man's legal right is but a restatement of his moral right. In critical logic, the student learns of two kinds of probability: intrinsic and extrinsic, the former drawn from the consideration of the matter itself, the latter from the statement of others. The "probable cause" phrase in this case constitutes the intrinsic probability demanded by the law, the "oath or affirmation" phrase the extrinsic. If the accuser is unwilling to support his accusation by an oath or affirmation, then no warrant may issue despite the intrinsic probability of the case as related. And rightly so, for the law exacts, like all strict morals, that no one accuse another unless he is absolutely certain of what he says: "...homo non debet ad accusationem procedere nisi de re omnino sibi certa",[47] says St. Thomas. That he who accuses is absolutely certain of what he says, he shows when he is willing to support his statement by an oath or affirmation.

Finally, the amendment states that no warrants shall issue except those "particularly describing the place to be searched, and the persons or things to be seized".[48] In virtue of this restric-

44. *Ibid.,* II-II Q. LX, Art. III ad 2 (The italics are ours).
45. *Ibid.,* II-II Q. LX, Art. II et Art. III c.
46. *Constitution of the United States of America*: Fourth Amendment.
47. St. Thomas, *Summa Theologica,* II-II Q. LXVIII, Art. III ad 1.

tion, magistrates may not delegate to others powers which they alone should exercise. In other words, they, not others, should judge; others are simply their aids commissioned to carry out their commands. If general warrants were issued, every officer of the law would become a judge, and the peace and tranquillity of the individual would become unduly disturbed. Another reflection, that might be added here, is that, since the actual search or seizure by an officer of the law must proceed in virtue of public authority, one must have some assurance that such power has been delegated in the particular instance. But one evidently cannot have this assurance, if the warrant does not describe the place to be searched or the persons or things to be seized. Now, St. Thomas seems to imply this also, when he says: "...rationabiliter institutum est ut accusatio, sicut et alia quae in judicio aguntur, redigatur in scriptis".[49]

LEGAL FOUNDATIONS: 1. The Spirit of the Declaration of Independence

Such is the moral foundation of the right of freedom from search. What, then, is its legal foundation? In the first place, *The Declaration of Independence,* our Birth Certificate as a nation, postulates this right in principle. One cannot read this sacred document without being impressed by its insistence on the injustice of tyrannical usurpations and suppressions and on the natural unalienable right of the individual to enjoy his God-given gifts of "*Life, Liberty* and the pursuit of *Happiness.*"[50] It is a policy of despotism that drives these colonists to declare their freedom. "Repeated injustice and usurpations"[51] have been heaped upon them, they assert; "He [the King of Great Britain] has dissolved Representative Houses repeatedly, for opposing with manly firmness his invasions on the rights of the people....He has erected a multitude of New Offices, and sent hither swarms of Officers to harass our people....He has

48. *Constitution of the United States of America*: Fourth Amendment.
49. St. Thomas, *Summa Theologica,* II-II Q. LXVIII, Art. II c.
50. *The Declaration of Independence* (The italics are ours).
51. *Ibid.*

combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their acts of pretended legislation....For depriving us in many cases, of the benefits of Trial by Jury: For transporting us beyond Seas to be tried for pretended offenses'',[52] etc. The whole tenor of the document is a protest against tyranny, an assertion of individual liberty. In virtue of the Declaration of Independence, therefore, is not one justified in demanding freedom from search? Without it, tyranny reigns and liberty becomes a misnomer. If, however, such be the sad state of affairs, then, as the noble document asserts, it becomes the right of the people to alter or abolish the government and institute in its place one that ''to them shall seem most likely to effect their Safety and Happiness''.[53]

LEGAL FOUNDATIONS: 2. National Guarantees

Another and much more explicit legal guarantee of the right of freedom from search is the Fourth Amendment to the Federal Constitution. Since this amendment was fully analyzed above, there is no reason to re-emphasize it here. Suffice it to say, however, that the Fourth Amendment is the strongest legal argument for the right. The wording is clear and comprehensive; moreover, it is a part of the supreme law of the land. Should it fail, what weight could the other legal guarantees have?[54]

The Fourth Amendment does not stand alone, for the Fifth, it would seem, substantiates it, by asserting that no person shall ''be deprived of *life, liberty* or *property, without due process of law*''.[55] Certainly if the Fourth Amendment means anything, then warrants for search and seizure (which concern ''liberty or property'') are integral parts of the ''due process of law''.

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52. *Ibid.*

53. *Ibid.*

54. Cf. Burdick, C., *The Law of the American Constitution, Its Origin and Development*, pp. 390-395.

55. *Constitution of the United States of America*: Fifth Amendment (The italics are ours).

Thus the Fifth Amendment is an added guarantee of the right.[56]

Nor are the Fourth and Fifth Amendments illogical appendages to the Constitution. The very preamble of this precious document postulates them. Even had they never been added, how could any one be unreasonably molested in his person, home, papers, or effects, when the very "raison d'être" of the Constitution, as stated in its preamble, was to "establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity"?[57]

LEGAL FOUNDATIONS: 3. State Guarantees

However, it may be objected, that all these are but Federal guarantees and do not in any way protect one against arbitrary State interference. That is true, yet most State constitutions contain similar provisions.[58] Thus, to take but a comparatively recent example, in February 1926, the Police Commissioner of New York pleaded the alleged right of policemen to enter forcibly and without warrant private premises, when they had reason to believe games of chance were conducted therein. However, Justice Strong of Brooklyn declared that such violence was contrary to the Bill of Rights of the State of New York and that "it is futile to argue that in the ends of justice the police should be given extraordinary rights or privileges not permitted by law".[59] Any other decision would have been not only un-American but also manifestly unjust.

So most State Constitutions decree. Nor do they lack Federal support in their contention, for just as the "due process" clause of the Fifth Amendment to the Federal Constitution serves as a guarantee to the Fourth, so the "due process" clause of the

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56. Cf. Burdick, C., *The Law of the American Constitution, Its Origin and Development*, pp. 390-395 for a different interpretation of the force of these two amendments, when taken together.

57. *Constitution of the United States of America*: Preamble.

58. Cf., e.g., Munro, W., *The Constitution of the United States of America, A Brief and General Commentary*, p. 140.

59. Cf. *America*, 34::17 (February 6, 1926), p. 392; 34::18 (February 13, 1926), p. 416.

Fourteenth Amendment serves as a confirmation of the freedom from search guarantees in the State Constitutions. It reads: "...nor shall any State deprive any person of life, liberty, or property, without due process of law".[60] Although this "due process" clause of the Fourteenth Amendment may be reasonably supposed to imply warrants, etc., nevertheless it may not be so interpreted except in accordance with the Constitutions, laws and customs of the different States.[61] The clause does not grant anything in this respect; it merely confirms what the State already asserts as the due process of law.

The second argument against State aggression is drawn from this same Fourteenth Amendment, which says: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[62] As was contended in the Chapter on Free Speech, this amendment invests Congress with the power and the duty to protect the individual against State aggression in the personal rights assured him in the first eight amendments to the Federal Constitution. To this effect, the eminent jurist, Wm. Howard Taft, wrote: "It [the Fourteenth Amendment] placed in the hands of the Federal Government the enforcement of the personal rights of every person in the United States".[63] If freedom from search is not one of these personal rights, one of these "privileges or immunities", what are these rights and what does the whole amendment really mean?

Finally, the very spirit of the Declaration of Independence and of the preamble to the Federal Constitution should serve as sufficient guarantee against State aggression. If it does not, then, let Americans hang their heads in shame and acknowledge that they have broken their promises with mankind and that their

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60. *Constitution of the United States of America*: Fourteenth Amendment.

61. Och, J., *American Political Science* ("The Constitution of the United States"), p. 31, Q. 148.

62. *Constitution of the United States of America*: Fourteenth Amendment.

63. Taft, W., *Popular Government*, p. 128.

venture among the nations of the world has been a rank failure![64]

ARTICLE III — VINDICATION OF THIS RIGHT

Such, then, is the right of freedom from search. We have seen so far, what we understand by it, what it consists of and how far it is limited. We have studied also the foundation of this right not merely from a moral but from a legal standpoint as well. The sole question of any practical value that remains to be treated is the vindication of this right. It is with this that we concern ourselves in the present article, by briefly considering the vindication of this right in the past, its violation at the present and the policy that ought to be pursued with regard to it in the future.

ITS VINDICATION IN THE PAST

It may be said with much truth, that the history of the United States is a history of violations and vindications of this right of freedom from search. Naturally, it would be impossible and futile besides, to cite here all the instances on record substantiating this contention; in consequence, just a few cases, sufficiently conclusive in themselves and illustrative of each period in United States history, are here briefly cited.

To any one conversant with America's early struggle for freedom, the so-called "writs of assistance" was one of the commonest and most obnoxious of colonial abuses, for every British officer was thereby armed with a general warrant into which he could insert the name of whomever he pleased. It was against such and similar acts, that the colonists rebelled and fought; and it was these acts they had in mind when later they wrote the Fourth Amendment.[65]

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64. Inasmuch as the National Government grants liberty and the State Governments take it away.

65. Cf. Munro, W., *The Constitution of the United States, A Brief and General Commentary,* p. 139.

It is also to be noted that the next war, with England in 1812, was fought in defense of the same principle. True, England had injured the neutral trade of the United States less than France had, yet it arbitrarily searched American ships and yearly (1804-1807) impressed thousands of American sailors. Against England, then, the war was declared,—in behalf of freedom from search, American blood was again generously spilt.

A half century later, this same struggle for freedom from search asserts itself anew. This, one gleans from a letter written by Jefferson Davis in 1887 to a Methodist Bishop. He says: "If, as already proposed there should be Federal laws to enforce Prohibition, your recollection of war and reconstruction days should enable you to anticipate the doings of an army of spies, informers, and deputy marshalls making domiciliary visits to insure the observance of the law....I hold it to be one of the natural rights of man to do as he pleases with his own provided he inflicts no injury on another. To protect the use and prevent the abuse of that right is the necessity of social existence".[66]

RECENT VIOLATION OF THE RIGHT

Surprising,—indeed prophetic words are these, written some fifty years ago yet graphically descriptive of a rather recent condition of affairs in the United States. The contention here is, not that prohibition is good or bad in itself, but that the prohibition amendment endangered and seriously and unduly limited, if not completely did away with, some of man's most sacred rights. Thus, it attacked the right of freedom from search. To what extremes in this regard, prohibition went[67] and attempted to go,[68] is now past history known to all alike. Despite the fact that the Eighteenth Amendment was a part of the Supreme Law of the land, what we still can not un-

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66. Cf. *Jefferson Davis, Constitutionalist, His Letters, Papers and Speeches,* Collected and edited by Dunbar Rowland, Jackson, Miss., 1923, 10 Vols.

67. E.g., Willis-Campbell Act of November 23, 1921 (Cf. *The Public Statutes at Large of the United States of America,* Vol. XLII, Part I, Washington, 1923, pp. 222-224).

68. E.g., Goff Bill (Cf. *America,* 35::7, p. 145 for May 29, 1926).

derstand is how other rights equally guaranteed had to be sacrificed on its altar. The Honorable Thomas W. Phillips, Jr. stated a most reasonable principle in regard to the Eighteenth Amendment, when he said, "it is the duty of the proper officers of each State to cooperate in enforcing it [prohibition] in so far as it does not conflict with implied or guaranteed individual rights".[69] That freedom from search is one of these guaranteed individual rights, there cannot be the least doubt. Hence, it also should have been safeguarded as sacredly and as zealously, as the defenders of the Eighteenth Amendment enforced theirs. That the Fourth Amendment had to be abrogated to enforce the Eighteenth is hard to understand either morally or legally; what, however, seems evident is that there was something radically wrong with the Eighteenth Amendment itself or its sumptuary enforcement legislation, the Volstead Act and all that that implied.

VINDICATION If this recent chapter in American History, namely, the Prohibition Regime, proves anything, it proves that the right of freedom from search stands in need of constant vigilance and vigorous defense. Now, it may be asked: Why all this concern about an apparently insignificant right, founded on nature, it is true, and guaranteed by the Supreme Law of the land?

REASONS FOR THIS CONCERN In the first place, the right of freedom from search is a right sacred to all people. No matter where men are found, whether organized or not (provided they are not enslaved), they have been granted freedom from search. Thus, the French,[70] with fearful recollections of the "lettres de cachet", inserted in their Declaration of 1789 (completed by the Constitution of 1791) as a natural right "la liberté à tout homme d'aller, de

69. Speech delivered in the House of Representatives, Monday, December 21, 1925 (Cf. *The Congressional Record,* Vol. LXVII - Part 2, p. 1276, pp. 1271-1277).

70. Cf. Vaquette, T., *Cours Elémentaire de Droit Usuel,* Paris, 1907, pp. 14, 15.

rester, de partir sans pouvoir être arrêté ni détenu que dans les cas déterminés par la loi et selon les formes qu'elle a prescrites". The Constitutions of the Year Three and of the Year Seven were even more explicit, for they declared, "la maison de toute personne habitant le territoire français est un asile inviolable." Similar examples could be cited from the Constitutions of other people, for all hold this right dear. Why, then, should not Americans champion this right founded on their nature and guaranteed in their constitution, why should they not fight for a cause common to all humanity?

But there are still other reasons why this right should be vindicated. These reasons might be called indirect reasons, since they do not directly concern the injury of this particular right. They are, so to say, parasitical and added consequences of the injury immediately sustained. There are three such results. First, if this right may be nullified, what is going to prevent other rights from being violated, such as religious liberty and free speech? They are all guaranteed by one and the same Constitution. If the Fourth Amendment is taken away, why may not the First and the others also be taken away? Or why have any Constitution at all, if it is not inviolable? Secondly, by violating the Fourth Amendment, lawlessness and disrespect for authority and political institutions are engendered. Officers take an oath to uphold the Constitution and under the pretext of enforcing it, break this very oath and this very Constitution they swear to uphold. They will never stop crime with crime; on the contrary, they thereby promote it. Thirdly, such violation is based on the false interpretation of the philosophical principle: The end justifies the means". This principle is true only, when there is question of means neither good nor bad in themselves, indifferent in other words. Never does it mean that a good end justifies bad means. Does not Holy Scripture say: "Thou shalt follow after that which is just"?[71]

71. *The Holy Bible* (Douay Version), Deuteronomy, XVI, 20.

VINDICATION? FIRM, JUST YET PRUDENT

For such and similar reasons, therefore, this right should be vindicated. How that can best be done is indeed a delicate question, demanding at the same time firmness, justice and prudence. In other words, to be more explicit: A person should, when an officer or a private individual attempts an arrest, a seizure or a search, demand his warrant to do so. If the said officer has no such warrant, he should then offer passive resistance to any action consequent thereon. True, one has a right to use physical force,[72] yet in a well-established community not only prudence but also justice dictate otherwise, for as St. Thomas counsels: "Potest esse vindicatio licita, *aliis debitis circumstantiis servatis*"[73]. The next legitimate step is to appeal to the court for redress. If that fails, one ought to take the case to a higher court or institute any other action, conformable to the moral law and the law of the land. In short, it should be a fight to the finish, firm and constant, yet always with due respect for justice and prudence.

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72. Cf. C. I, Art. IV Properties of Rights, "Coaction or Vindication".

73. St. Thomas, *Summa Theologica,* II-II Q. CVIII, Art. I c. (The italics are ours).

CHAPTER VI

JUDICIAL RIGHTS IN THE UNITED STATES

ARTICLE I — STATUS OF THE QUESTION

The preceding chapter on "Freedom from Search" serves as a natural introduction to the present treatise on "Judicial Rights", for the former considers rights preliminary to court examination, while the latter views them as to prosecution and procedure. It is only in view of such a subsequent trial (aside from the specific conditions posited in the preceding chapter), that search and seizure can be justified.

These rights are called "judicial rights", since they embrace all rights relative to judicial prosecution and procedure. In the final analysis, they are nothing more than rights at court or guarantees against unauthorized prosecution and arbitrary procedure. They are sometimes referred to as the "rights of the criminal", the term "criminal" being taken in the large and more or less arbitrary sense of "defendant". It is with his rights and not directly with those of the "plaintiff" that the present chapter deals, for it is the rights of the accused that the law expressly concerns itself with and that the Constitution explicitly guarantees. Must it, then, be inferred that the plaintiff stands legally unprotected? On the contrary, the State must protect him as well, by meting out justice to those who would injure him. The criminal has rights, it is true, but the innocent has also; justice must balance the scales so that in procuring the rights of the one it does not unduly injure those of the other.

Yet, what is the actual "record" in this regard, what are the facts? The people's sense of proportion has been distorted and the scales of justice jolted, for Americans, in their zeal to safeguard the accused, have bared themselves to his repeated attacks. As a prosecuting attorney in New York once put it: "In this criminal game, the cards are stacked against the people. At best, the people have only one chance of bringing the criminal to a fair trial, while the criminal has a dozen ways of escaping even

a trial and faces probably one chance in fifty of conviction".[1] Nor is this just an unwarranted statement, for the statistics on crime and conviction fully substantiate it.[2] Americans, indeed, have come to a sad state of affairs, when they permit themselves to be blinded by the alleged rights of the criminal, to the extent that they forget that the innocent also has rights and the State the right and the duty to be the sole and impartial dispenser of justice.[3]

The problem, therefore, arises: How are we to balance the scales of justice so as to procure the rights of the criminal as well as of the innocent without in any way thereby injuring those of the one or of the other? The manner of approach will have to be from the outside, from the two extremities to the golden mean, to the "virtus stat in medio". The right and the duty of the State to vindicate justice will have to be studied first; then the right of the criminal to a fair and just trial together with all its implications. How much, each in full justice may lay claim to, will have to be determined, for it is only by thus defining the rights of the one that limits can be set to those of the other and vice versa, in accordance with the doctrine of the limitation of rights, as expounded in the first chapter.[4]

After theoretically establishing from a moral as well as from a legal viewpoint the rights of the one and of the other, we shall examine just how far present-day conditions in reality fall short of this ideal. The duty will then devolve upon us to solve the problem, by exposing its causes together with its corresponding remedies.

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1. Cf. *America,* 33::7 (May 30, 1935), p. 162.

2. To take but one set of statistics, as furnished in *America,* 33::4 (May 9, 1925), p. 88, for 1,749 murders over a period of seven years, only 231 persons were convicted, while less than 50 were executed. In Chicago for the 333 murders of 1924, only 27 murderers were convicted.—Cf. also *Criminal Justice in Cleveland,* Cleveland, Ohio, 1922, for the study of 4,499 felony cases, in which only 14 per cent of the persons indicted were found guilty of either felony or misdemeanor.

3. The editors of *America* are of the same opinion. Cf., e.g., 31::23 (September 20, 1924), p. 547; 38::1 (October 15, 1927), p. 6.

4. Cf. C. I, Art. IV Properties of Rights, "Limitation".

ARTICLE II — THE RIGHT AND DUTY OF THE STATE

INTRODUCTION In the second chapter, it was pointed out[5] that Civil Society is a natural institution, an enduring union of men politically organized for the promotion of the common welfare. It was there[6] also contended that Civil Society has need of authority in order to endure and to attain its end. In partial substantiation thereof, the authority of Solomon ("Where there is no governor, the people shall fall")[7] and that of St. Thomas ("Oportet igitur esse in omni multitudine aliquod regitivum")[8] were cited.

THREEFOLD FUNCTION OF AUTHORITY Now, civil authority, in order to fulfill its purpose (the promotion of the common welfare), must be accorded a threefold office,[9] namely:

(1) Legislative, whereby laws may be made directive of human activity to a common end,

(2) Judiciary, whereby these laws may be interpreted and applied to particular cases,

(3) Executive, whereby these same laws may be carried out and these judgments put into effect.

The legislative function is the foundation of the other two, their source and basis. Without it authority has no meaning, for authority is necessary, only in so far as it is directive of human activity to a common end.[10] To attain this end, certain norms must be established and promulgated. In other words, laws must be made, since a law is nothing more than a "regula et mensura actuum agendorum vel omittendorum",[11] and is de-

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5. Cf. C. II, Art. II Civil Society or The State, "Origin of Civil Society".
6. Cf. *Ibid.*, "Necessity of Authority".
7. *The Holy Bible* (Douay Version), Proverbs, XI, 14.
8. St. Thomas, *De Regimine Principum*, Liber I, Caput I.
9. Cf., e.g., Coppens, C., *A Brief Text-Book of Moral Philosophy*, p. 146.
10. Cf. C. II, Art. II Civil Society or The State, "Necessity of Authority".
11. St. Thomas, *Summa Theologica*, e.g., I-II Q. XC, Art. I, II, IV; Q. XCI, Art. II; Q. XCIII, Art. III; Q. XCV, Art. IV, etc.

fined by St. Thomas as a "quaedam rationis ordinatio ad bonum commune et ab eo qui curam communitatis habet, promulgata".[12]

From this legislative function, which is at the root of all authority, naturally flow the judiciary and the executive. These two functions are but its natural extension and consequence,[13] for of what avail would laws be, if they were not to be applied and executed? Of what avail is an expert navigator and perfect mechanism to a ship, if the one is not to apply the other, or if the captain cannot command such proper use thereof? So with laws; laws are meaningless unless interpreted and applied aright; laws are useless unless executed.

After a law has been promulgated, it must be applied. This application, however, presents certain difficulties, arising either from the obscurity of the law itself or the very nature of the facts or from the uncertainty of the responsibility incurred. Hence, the necessity arises of positing in the supreme authority not only legislative power but also power to solve these difficulties in the application of the law.[14] This power is commonly known as the judiciary and may be defined with Zigliara as the "facultas moralis, seu jus applicandi leges ad aliqua particularia determinate".[15]

That this power is necessary is evident from what has already been said. Moreover, it may be said that this power is derived from the legislative as from an immediate principle, for the act of the judiciary is judgment, which St. Thomas defines as the "quaedam definitio vel determinatio ejus quod justum est".[16] But, something is "just", either because of its very nature (a natural right) or because legitimate authority has deemed it necessary for the common good and has promulgated a law to this effect (a positive right).[17] In consequence, this definition or determination of what is just according to the positive law is

12. *Ibid.*, I-II Q. XC, Art. IV.
13. Lahr, Ch., *Cours de philosophie,* Tome II, p. 235.
14. *Ibid.*, Tome II, p. 236.
15. Zigliara, T. M., *Summa Philosophica,* Vol. III, p. 245.
16. St. Thomas, *Summa Theologica,* II-II Q. LX, Art. V.
17. *Ibid.*

nothing more than a practical interpretation and application of the law to the particular case. Now, this act of the judiciary in principle (not as to its exercise) must inhere in the legislative; he who makes the law, must have the power to interpret and apply it, else laws could be interpreted and applied contrary to the intention of the lawgiver and destructive of the very purpose of the law as directive of human activity to a common end.[18] This is, in substance, the doctrine that St. Thomas expounds, when he says: "Cum autem ejusdem auctoritatis sit legem interpretari, et legem condere; sicut lex condi non potest nisi publica auctoritate, ita nec judicium ferre potest nisi publica auctoritate."[19]

From the legislative function flows that of the executive as well, for of what avail would law and its application to the particular case be, if the final terminus of it all would be, not to execute it? Without the executive, the legislative would be rendered useless and the judiciary meaningless. Laws are made to be observed else why make them; authority is instituted to direct human activity to a common end, but of what avail is it if it cannot enforce its commands in this regard after they have been duly promulgated and applied?

THE RIGHT TO PUNISH

If it be conceded, then, that laws are useless unless enforced, the question arises how to enforce them. For the ordinary person, there is but one answer to the question, namely, sanction, i.e., a system of rewards or penalties apportioned for the observance or violation of law;[20] for the practical person, the answer becomes still simpler, for, why reward if the very object of law observance is a reward, i.e., the common welfare? Besides, how could one, practically speaking, reward all law-abiding citizens?[21] Hence, in the final analysis, the question resolves itself down to this, that to enforce law the State must have the Right to Punish. In the

18. Zigliara, T. M., *Summa Philosophica,* Vol. III, p. 245.
19. St. Thomas, *Summa Theologica,* II-II Q. LX, Art. VI.
20. Le Buffe, F., *Outlines of Pure Jurisprudence,* p. 26.
21. *Ibid.,* p. 28.

exercise of this right, the legislative would appoint the punishment, the judiciary award it, and the executive inflict it.[22]

That the State has this right is evident, for what was argued in behalf of authority in general can be argued here in behalf of the specific authority to punish. Civil Society is natural, ordained by nature's God. Since authority is necessary to Civil Society, it also must be from God. This argument is based on the contention that God makes nothing in vain. If He wills an end, He must will the means also; if He instills a duty, He bestows also the right to the means necessary for the fulfillment of that duty. In other words, natural societies must have the natural right to those means necessary for the pursuance of their ends.

For the attainment of the end of Civil Society (the common welfare and more immediately the public peace and security) the right to punish must inhere in public authority. Without such power in civil as well as in criminal suits, the public peace and security could never be preserved and safeguarded. As to civil suits, disputes frequently arise between rival claimants, which if not juridically decided, endanger if not positively disturb the public peace;[23] so everyday experience demonstrates. As to criminal affairs, personal observation as well as history are witnesses to the fact that in any large multitude, there are always some if not many who will seek their own personal advantage to the detriment of others by law violation, unless they are restrained therefrom by the fear of punishment. Without a deterrent of this sort, crimes increase, the rights of citizens are attacked, the peace and security of the commonwealth are impaired.[24] Hence, the right to punish is an indispensable and, therefore, a natural right of Civil Society. Or, as St. Thomas expresses it: "Ideo per divinam providentiam ordinatum est ut in terris sint homines qui, per poenas sensibiles et praesentes, alios ad observationem justitiae cogant[25]..Ad conservationem autem

22. Coppens, C., *A Brief Text-Book of Moral Philosophy,* pp. 150, 151.
23. Cathrein, V., *Philosophia Moralis,* p. 492.
24. *Ibid.,* pp. 492, 493.
25. St. Thomas, *Summa contra Gentiles,* Liber III, Caput CXLVI.

concordiae inter homines necessarium est quod poenae malis infligantur''.[26] Moreover, if one is to take the word of the eminent Cardinal Zigliara, there can be no question of this right; everyone concedes it. Zigliara maintains: ''Convenit inter omnes... inesse auctoritati politicae jus infligendi poenas improbis ut bonum sociale conservetur''.[27]

Zigliara, moreover, asserts that, although there is unanimity of opinion as to the right to punish, still there is much disagreement as to the quality of punishment, as also in particular to the infliction of the death penalty.[28] It is about these two questions, that the rest of this article will have to be at least briefly concerned.

THE QUALITY OF PUNISHMENT

In the first place, what should be the quality of punishment? As to the false theories advanced thereon, the reader is referred for the sake of brevity to a rather succinct though comprehensive treatment thereof in Cathrein's *Philosophia Moralis.*[29] As to the true doctrine thereon, it may be said that punishment in order to be righteous must fulfill certain prerequisites, besides having a number of determined ends in view.

THE PREREQUISITES OF PUNISHMENT

The two prerequisites of punishment are justice and social utility.[30] By saying that a punishment must be just, is meant: (1) that the one who inflicts it must have the authority to do so; (2) that the one who is punished be culpable and responsible; (3) that due proportion be observed between the offense and the punishment.[31] Only when these three conditions are fulfilled, is punishment truly just.

Besides being just, punishment must be dictated by social utili-

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26. *Ibid.*, Liber III, Caput CXLVI; cf. etiam *Summa Theologica,* II-II Q. LXV, Art. I, II, III; Q. LXVII, Art. IV.

27. Zigliara, T. M., *Summa Philosophica,* Vol. III, p. 247.

28. *Ibid.*

29. Cathrein, V., *Philosophia Moralis,* pp. 493-496.

30. Lahr, Ch., *Cours de philosophie,* Tome II, p. 238.

31. St. Thomas, *Summa Theologica,* Q. LXXXVII, Art. III ad 1; Art. IV c.

ty. In practice, Society neither can nor should punish every bad act. Since its end is the common welfare, only those acts that strike at its very existence or thwart its purpose should be prohibited and punished. In fact, it neither should nor could do more. In this regard, St. Thomas says: "Et ideo lege humana non prohibentur omnia vitia...sed solum graviora, a quibus possibile est majorem partem multitudinis abstinere, et praecipue quae sunt in nocumentum aliorum, sine quorum prohibitione societas humana conservari non posset".[32]

THE ENDS OF PUNISHMENT

Such, then, are what are called the two prerequisites of punishment. On them depends to a large extent its quality. However, that which really determines its quality is largely if not almost entirely its purpose. Viewed in its entirety, the intrinsic purpose of punishment is nothing more than furnishing to man's will a sufficient motive for law observance.[33] Let us, therefore, briefly analyze this end; in "statu comminationis" punishment induces to law observance and dissuades from law violation and, hence, is purely preservative;[34] on the other hand, in "statu executionis" punishment is purely curative.[35] Since it is with actual violation of law that one must deal, and not so much with future contingencies, it is the curative idea of punishment that must be here briefly considered. This curative purpose should be threefold: reparative, deterring, medicinal.[36] This appears but reasonable, for in the first place punishment should repair the juridic order disturbed by the act. Since the preservation thereof is the very end of Society, to secure it, pleasure and advantage should be consequent on law observance. Now, for the criminal, the tables are reversed and pleasure and advantage are consequent on its violation. To reestablish order not only must the

32. *Ibid.*, I-II Q. XCVI, Art. II.

33. Le Buffe, F., *Outlines of Pure Jurisprudence*, p. 27.

34. Le Buffe, F., *op. cit., loc. cit.;* Cathrein, V., *Philosophia Moralis*, p. 496.

35. Le Buffe, F., *op. cit., loc. cit.;* Cathrein, V., *op. cit, loc. cit.*

36. So also, e.g., Paul L. Blakely, "You and Your Jail", *America*, 55::2 (April 18, 1936), pp. 38, 39.

criminal desist from his act and restore (either directly or indirectly)[37] what he has taken away or injured, but he and his fellow citizens must be felt to understand that positive pain and disadvantage and not simply restitution are entailed in law violation. So the juridic order demands.[38]

In the second place, punishment should be deterring, i.e., it should efficaciously dissuade from a like violation. It must intimidate and counteract any desire of imitation or repetition, else punishment would lose its effectiveness and to a large extent its very raison d'être.

In the third place, punishment should be medicinal, i.e., it should reform the criminal or at least have that as object, even if that should be regarded as neither possible nor probable. Amelioration, viewed simply as possible, should ordinarily have no effect on the amount and quality of the punishment to be meted out; however, amelioration, reasonably presumed, should more or less considerably lighten or at least defer for some time, until certainty of amendment be established, the punishment to be inflicted.[39]

Such are the three ends of punishment, as outlined in some form or other by Catholic theologians. Substantially they are the same as those enunciated by the Angelic Doctor *ex professo* in his treatise on "Vindicatio"[40] and *passim* throughout his *Summa Theologica.*[41] The question arises as to what extent these ends must be attained or at least attempted. With Taparelli,[42] it may be maintained that the more fully these three ends are realized, the more perfect is the punishment.[43] This would imply that in point of fact these ends may not all be equally intend-

37. Jaccoud, J-B., *Droit naturel et Démocratie,* Fribourg en Suisse, 1923, p. 338.

38. Coppens, C., *A Brief Text-Book of Moral Philosophy,* p. 151.

39. Jaccoud, J-B., *Droit naturel et Démocratie,* p. 340.

40. St. Thomas, *Summa Theologica,* II-II Q. CVIII.

41. *Ibid.,* I-II Q. LXXXVII, Art. III ad 2; II-II Q. LXVIII, Art. I.

42. Taparelli, L., *Cours Elémentaire de droit naturel,* (Trans. from the Italian), Livre IV, Ch. III, no. 806.

43. Thus also Lahr, Ch., *Cours de philosophie,* Tome II, p. 239.

ed, if indeed intended or attained at all. Such is really the case. In Civil Society, the reparative idea is absolute and paramount,[44] while the medicinal and the deterring usually vary and depend for their effectiveness largely on the nature of the particular society and the personal element of the individual to be punished. Hence, in procuring these two last mentioned ends, due regard must be had for these two factors.[45] Moreover, the medicinal quality, at least as far as the sinner is concerned, need not always be present;[46] in this regard, St. Thomas says: "...poena quae etiam secundum leges humanas infligitur, non semper est medicinalis ei qui punitur, sed solum aliis".[47]

With these principles concerning the quality of punishment established, the practical application thereof becomes more or less simple, provided, undue cruelty or leniency neither blind the vision nor distort the judgment. Experience, however, reveals that difficulties do arise.

These are but the general principles by which the penal expert must be guided in his researches, conclusions and applications.

CAPITAL PUNISHMENT Zigliara[48] maintains that the second question, whereon unanimity of opinion does not exist, is capital punishment. Ever since the days of Beccaria, it has been a mooted question, with many and varied opponents.[49] However, in view of the irrefutable testimony that

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44. Jaccoud, J-B., *Droit naturel et Démocratie,* p. 337; also Coppens, C., *A Brief Text-Book of Moral Philosophy,* p. 152.

45. Zigliara, T. M., *Summa Philosophica,* Vol. III, p. 248.

46. Coppens, C., *A Brief Text-Book of Moral Philosophy,* p. 152.

47. St. Thomas, *Summa Theologica,* I-II Q. LXXXVII, Art. III ad 2.

48. Zigliara, T. M., *Summa Philosophica,* Vol. III, p. 247.

49. E.g., Waldensians, Anabaptists, Bentham, Lucas, Spedalieri, Ahrens, Holtzendorff, etc. Needless to say, opponents of capital punishment exist to-day and even here in the United States. Thus, for instance, we are informed of the existence in New York City of a League for the Abolition of Capital Punishment. (Cf. *America,* 36::22, p. 517 for March 12, 1927) —Mr. William Randolph Hearst, President of a league for the suppression of crime, we are told (Cf. *America,* 37::10, p. 223 for June 18, 1927), objects to capital punishment on the ground that "the State has no more right to take life than any private individual"; while Dr. Fred L. Hoffman

can be amassed in favor of capital punishment, the specious arguments against it dwarf into insignificance. Hence, why should we be detained here with answering the objections? Should the reader be interested, he will find in Cathrein's *Philosophia Moralis*[50] a succinct yet able treatise thereon.

That the State has the right to inflict the death penalty for the more atrocious crimes, there cannot be the least doubt. Not only do reason and the consensus of all people and of all ages attest it, but Scripture and tradition also expressly concede or clearly suppose it.[51] No Catholic, (to our mind), denies or could deny it;[52] the opinion of Duns Scotus[53] certainly looks dubious in view of the pronouncement of Innocent III.

But what are the grounds whereon rests the right of the State to inflict the death penalty? In the first place, Sacred Scripture expressly concedes or clearly supposes it.[54] Thus, in the Old Testament, it was imposed for the more grievous crimes;[55] one has but to read the following texts wherein this punishment is clearly prescribed: Genesis IX, 6; Exodus XXI, 12, 14, 23; Exodus XXII, 18; Leviticus XXIV, 17; Deuteronomy XIX, 11, 12; Deuteronomy XXI, 22; Psalm C, 8.[56] That the death penalty was an integral part of the Mosaic law is, then, incontestable.

Moreover, the New Testament does not abrogate the death sentence as a right of civil authority. When the Savior was delivered over to Pontius Pilate, did He not indirectly assert the State's right in this regard, when He said: "Thou shouldst not have any power against Me, unless it were given thee from a-

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favors its abolition, because experience has shown that juries are reluctant to inflict it. (Cf. *America*, 37::14, p. 319 for July 16, 1927).

50. Cathrein, V., *Philosophia Moralis*, pp. 496-501.

51. So reason, e.g., Koch, A.-Preuss, A., *A Handbook of Moral Theology*, 5 Vols., St. Louis, 1918-1924, Vol. V, pp. 146 ff.; Paul L. Blakely, *America*, 33::5 (May 16, 1925), pp. 105, 106.

52. Cf. *America*, 36::22 (March 12, 1927), p. 517.

53. Scotus, John Duns, *In IVum Sent.*, Dist. 15, q. 3 (Cf. Bibliography).

54. Slater, T., *A Manual of Moral Theology*, 2 Vols., New York, 1918, Vol. I, p. 305.

55. St. Thomas, *Summa Theologica*, I-II Q. CV, Art. II ad 10.

56. The references are all to *The Holy Bible* (Douay Version).

bove''?[57] Does not St. Paul, likewise, concede the State this same right, in even clearer terms, when he declares: "For if I have injured them, or have committed anything worthy of death, I refuse not to die''?[58] Does not the same illustrious Apostle of the Gentiles with still greater emphasis reiterate the same thought, with the added inference as to the divine origin of this right, when he asserts: "But if thou do that which is evil, fear: for he [the prince] beareth not the sword in vain. For he is God's minister: an avenger to execute wrath upon him that doth evil''?[59] Such is, in short, the teaching of the New Testament on the right of the State to inflict capital punishment. In this regard, Dr. Koch says: "In reality the New Testament presupposes the death penalty as an integral constituent of the penal law''.[60]

Such also is the interpretation of the Fathers thereon, namely, that Sacred Scripture teaches that the State has not only the right but also the duty to inflict the death penalty.[61]

In the second place, tradition confirms the same doctrine. Does not Innocent III demand of the Waldensians on their return to the faith the profession: "De potestate saeculari asserimus, quod sine peccato mortali potest judicium sanguinis exercere dummodo ad inferendum vindictam non odio, sed judicio, non incaute, sed consulte procedat''?[62] How any Catholic, since the thirteenth century in particular, could or can deny the right, in the face of this pronouncement, is indeed difficult to understand.

The third argument is drawn from the *consensus gentium.* Even a cursory study of the history of criminal law[63] will disclose the fact that practically among all people of all climes and

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57. *Ibid.*, John, XIX, 11.

58. *Ibid.*, Acts, XXV, 11.

59. *Ibid.*, Romans, XIII, 4.

60. Koch, A.-Preuss, A., *A Handbook of Moral Theology,* Vol. V, pp. 147, 148.

61. Cf. Pruner, J-Ev., *Théologie Morale* (Translated from the German by P. Bélet), 2 Tomes, Paris, 1880, Tome I, p. 679.

62. Denzinger, *Enchiridion Symbolorum,* etc., no. 425.

63. Mouton, E., *Le Devoir de Punir,* Paris, 1887, pp. 72-119.

of all times the death penalty, if not actually imposed, still existed. Now, this fact is more significant than at first it might appear. How explain why people of all ages so meekly conceded to the State the right to deprive them of their most precious treasure, if they did not realize, although but faintly, that this right was an indispensable prerogative of Civil Society and, therefore, a consequence of the natural law?[64] The fact, that in recent years capital punishment has been abolished in certain parts, does not in the least imply that the right has been renounced. Father Joseph Rickaby goes so far as to say: "No Government can renounce it. The abolition of capital punishment by law only makes the power of inflicting it latent in the State; it does not and cannot wholly take the power away."[65]

Over and above these arguments, there are those drawn from reason. These, however, are so many and varied, that only one of them is here presented. As was mentioned above, Civil Society is a natural institution and as such has a natural right to all the means necessary for the attainment of its end, namely, the common welfare and more specifically the public peace and security, by the protection of the people's rights. In consequence, if capital punishment is a necessary means to the attainment of this end, then the State must have the natural right to inflict it. That capital punishment is such a necessary means can be proved variously: First, there are men so depraved, that the only efficacious way of protecting Society against a repetition of their outrages is to deprive them of life;[66] now, life imprisonment does not give this assurance, for wile or force may sooner or later free the criminal.[67] Second, in a large multitude, there are always some, if not many, that can be efficaciously deterred from the more atrocious crimes only by the threat and

64. Koch, A.-Preuss, A., *A Handbook of Moral Theology,* Vol. V, p. 150.
65. Rickaby, J., *Moral Philosophy,* Part III, Ch. VIII, Sec. VIII No. 5 (p. 347).
66. Cathrein, V., *Philosophia Moralis,* p. 497.
67. *Ibid.,* p. 499.

fear of the death penalty.[68] Since this is the case, the State must have the right to this means of self-defense, this means of safeguarding the common good. Such is, in substance, also the doctrine of St. Thomas thereon: for the Angelic Doctor, it is always the common good that justifies the death sentence. But two of his numerous references[69] to the subject are cited here: "...occidere malefactorem licitum est, inquantum ordinatur ad salutem totius communitatis; et ideo ad illum solum pertinet cui committitur cura communitatis conservandae";[70] and again "...si aliquis homo sit periculosus communitati, et corruptivus ipsius propter aliquod peccatum, laudabiliter et salubriter occiditur, ut bonum commune conservetur".[71]

That the right exists, there can be no doubt. As to its use, that is quite another question. The theologian and the philosopher leave to the penal experts,[72] guided by these principles concerning the divine origin of the right, to work out for what crimes and under what circumstances such a supreme penalty must be inflicted. In conclusion, it may be remarked that, although necessity does not create the right, still it should dictate its use.[73] Only when other means have failed, should the supreme penalty be inflicted. In this regard, Dr. Koch says: "If society is not in a state of necessary self-defense against internal enemies and the dangerous elements can be rendered innocuous by other means, such as incarceration, banishment, or deportation, or if certain crimes do not imperil law and order and the public peace, the death penalty should not be inflicted."[74]

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68. *Ibid.*, p. 498; cf. also Pruemmer, D., *Manuale Theologiae Moralis,* Vol. II, p. 110.

69. St. Thomas, e.g., *Summa Theologica,* I-II Q. LXXXVII, Art. III ad 2; II-II Q. XXV, Art. VI ad 2; Q. LXIV, Art. II, Art. II ad 3; Art. III, Art. III ad 2;Q. LXVI, Art. VI ad 2; etc.—*Summa contra Gentiles,* Liber III, Caput. CXLVI.

70. St. Thomas, *Summa Theologica,* II-II Q. LXIV, Art. III.

71. *Ibid.*, II-II Q. LXIV, Art. II.

72. *Ibid.*, I-II Q. XCV, Art. II ad 4.

73. Lahr, Ch., *Cours de philosophie,* Tome II, p. 239, footnote.

74. Koch, A.-Preuss, A., *A Handbook of Moral Theology,* Vol. V, p. 153.

ARTICLE III — THE RIGHTS OF THE "CRIMINAL" OR "OUR JUDICIAL RIGHTS"

If the States have rights, so have the individuals of whom these commonwealths are composed.

Section I: Enumeration of These Rights

IN GENERAL The judicial rights, that all living within the confines of the United States may morally and legally claim, may be classified for reasons of clarity into four categories: Rights preliminary to trial, rights in criminal processes, rights in common law suits and rights subsequent to trial. In addition, there are two other rights, which may be considered as corollaries of the foregoing.

To the specific enumeration of these rights, may be prefaced the general principle: That no person may be deprived of life, liberty or property without due process of law, and that (in order to safeguard this principle against any special legislative act opposed thereto in its more serious consequences) the powers that be have no right to pass any bill of attainder.

1. RIGHTS PRELIMINARY TO TRIAL With this general principle posited, the four categories of rights, above cited, are here enumerated. In the first place, every person is possessed of the following rights, preliminary to any court procedure strictly so-called: 1. The right to be immune from any *ex-post-facto* law; 2. The right to have special safeguards against arbitrary actions as regards the highest crime known to Society, namely, treason; 3. The right to be tried for an infamous crime, ordinarily only on a presentment or indictment of a grand jury; 4. The immunity from retrial for an offense after having previously been acquitted thereof; 5. The right of *habeas corpus,* i.e., the right to have the lawfulness of one's arrest established and to be released on bail, if possible, until the trial.

2. RIGHTS RELATIVE TO CRIMINAL PROCESSES

The second category of judicial rights, i.e., those relative to criminal prosecution, should include the following: 1. The right to a speedy and public trial; 2. The right to be tried by an impartial jury of the State and district wherein the crime shall have been committed; 3. The right to be informed of the nature and the cause of the accusation; 4. The right to be confronted with one's accusers; 5. The right not to be compelled to bear witness against oneself; 6. The right to have compulsory process for obtaining witnesses in one's favor; 7. The right to have the assistance of counsel for one's defense.

3. RIGHTS RELATIVE TO COMMON LAW SUITS

The third category of judicial rights is less in importance as well as in extension, and includes: 1. The right to a trial by jury in the more serious controversies (for instance, where more than Twenty Dollars is at stake); 2. The right never to have a fact once tried by a jury to be reëxamined except according to the rules of common law.

4. RIGHTS SUBSEQUENT TO TRIAL

The rights subsequent to trial, constituting the fourth class of judicial rights, are perhaps the most important. They guarantee: 1. Immunity from excessive bail; 2. Immunity from excessive fines; 3. Immunity from cruel and unusual punishments.

5. TWO SUPPLEMENTARY RIGHTS

Supplementary to these four categories, and, as it were, logically flowing from the general principle posited above, are: 1. The right to be justly compensated for private property that the State may deem necessary to take over for the public use; 2. The right to be free from quartering soldiers in time of peace without one's consent, and in time of war except in a manner to be prescribed by law.

There are probably other judicial rights, although these are the principal ones that men may morally as well as legally claim here in the United States.

Section II: Moral Foundation of These Rights

BASIC GENERAL PRINCIPLE

Since the individual enjoys *by a grant of nature* the inestimable rights of life, liberty and property,[75] he may not be deprived of them except according to due justice. However, he lives in Society and, therefore, comes in conflict with his fellowmen,—their respective rights apparently clashing. To settle these inevitable clashes is the unmistakable duty of the State. In the performance of this important function, the State must conform herself to the dictates of right reason, i.e., to law, else she would be inflicting a wrong in the very act of trying to forestall it; the end never justifies the means. Hence, the State must never deprive nor tolerate another to deprive a person of life, liberty or property except according to due process of law, whereby both sides can be heard, the comparative claims established and justice done. Arbitrary action on the part of the State and still less on the part of the individual can never be justified.

Since a bill of attainder is "a legislative act which inflicts punishment without a judicial trial",[76] such an act must be prohibited in virtue of the same reasoning. A bill of attainder is one-sided; it considers merely the claims of the plaintiff, allowing the defendant neither the moral nor the legal right to vindicate his right by a suitable and reasonable defense.

1. OF RIGHTS PRELIMINARY TO TRIAL

The first of the judicial rights preliminary to trial is the right to be immune from the enactment of any *ex-post-facto* law. Such an immunity is a requisite of a free people. True, *ex-post-facto* laws may occasionally serve their purpose, yet they ordinarily lend themselves to more abuse than good. Considered in itself, aside from attenuating circumstances, how in strict justice can an *ex-post-facto* law be justified? If an act is legally

75. Cf., e.g., Le Buffe, F., *Outlines of Pure Jurisprudence,* pp. 88, 89, 90, 94, 95, 96.

76. Cummings *v.* Missouri (1886) 4 Wallace 277, 323.

non-criminal, non-punishable at the time of its committal, it is unjust (all other things being equal) to impute to him, who performs such an act, either the guilt of crime or the penalty of punishment,—for he considered neither in performing the act. If the State had the power to pass *ex-post-facto* laws, then injustice would reign supreme and the peace and security of the State would be impaired; in that case, e.g., all good law-abiding citizens, who prior to the 18th Amendment manufactured, sold or transported intoxicating liquor for beverage purposes, could have become criminals by such a process and could have been punished for an act which they thought at the time to be innocent (as in point of fact it was). Hence, one must be immune from such an arbitrary and dangerous piece of mechanism as the *ex-post-facto* law, if justice is to be safeguarded and the peace of the community preserved.

The second right, preliminary to trial, is to be possessed of certain safeguards against arbitrary action as regards the highest crime known to Society, namely, treason. Since treason is considered extra grievous, it is open to more arbitrary action than any other crime; governments are only too fast to act when they themselves are directly attacked and their very existence is threatened. Hence, individuals must be protected from an outraged and often enraged government; treason must be explicitly defined; clear and specific guarantees for a just trial must be assured; the punishment to be meted out must be limited so as to forestall abuse. Only when these guarantees are established by the law of the land, is one effectively protected from arbitrary and unjust action on the part of an offended and perhaps tyrannical administration. Justice or due proportion must always be observed, even when there is question of the highest crime known to Society; justice knows no exceptions, mistaken zeal or wounded pride must never blind its decisions.

The third judicial right, preliminary to trial, is the right to be tried for an infamous crime ordinarily only on a presentment or indictment of a grand jury. This right is due one in strict justice, although at times expediency might demand its abroga-

tion. To be tried for an infamous crime, when there is not sufficient evidence of guilt to warrant being put on trial, is certainly an injustice, a smirch on character, the cause of undue worry, the loss of valuable time and money. Grand jury does away with any such arbitrary, unjust action.

The fourth right renders one immune from retrial for an offense, of which one has previously been acquitted. Although retrial may at times be beneficial and mete out justice when previously it was not meted out, still the evils of retrial far outbalance the good it may occasionally procure. If retrial were permissible, then the innocent person, who had once been acquitted at the expense of inestimable mental and material loss, could never be perfectly at ease for the future; at any time he might be summoned to reappear for trial and perhaps suffer a reversal of the sentence, due to an unjust or arbitrary court procedure. If such were the case, one could never be safe, never enjoy peace of mind. Justice demands that, if once found innocent, no one be tried again; exceptions might justify contrary action, but it must be remembered that exceptions are not the rule. One must always choose the lesser of two evils, and in this case of retrial, its prohibition is the lesser.

The fifth and final right, preliminary to trial, is what is known as the right of *habeas corpus,* i.e., the right to have the lawfulness of one's arrest established and to be released on bail until the trial, if this is found to be at all possible and reasonable. Without such a right, many innocent persons would have to linger unjustly in prison, to be punished in this manner for something of which they have not been as yet found guilty. Justice demands that, when arrested, one be immediately brought before a justice of the peace to be examined and held for trial if this be decided to be reasonable, or dismissed if this is found to be unwarrantable. Since the sentence of the justice of the peace is not a trial but simply a justification to detain one for a trial, and since the guilt of that person has not been as yet judicially established, he must be accorded his freedom, due safeguards however being made to assure his appearance at the trial. Bail

in proportion to the gravity of the offense, to the nature of the punishment and the wealth of the accused or of his friends, morally assures his appearance at the trial. At the same time, it relieves him of an unjust prison sentence for a crime, of which he has not been as yet judicially proved guilty. Naturally, the common peace and security direct that bail be not allowed for capital offenses, since the punishment of these crimes can never be estimated in terms of money.

2. OF THE RIGHTS RELATIVE TO CRIMINAL PROCESSES

Such are, from a moral viewpoint, the judicial rights of the first category. Let us now briefly consider, in the same light, the second class, namely, rights relative to criminal processes. The first of these rights is the right to a speedy and public trial. This right is fundamental; speedy, because, if the trial is unduly delayed or prolonged without reason, the innocent are made to suffer and suffer unjustly, until cleared of the charge against them; public, because, if the trial is private, it lends itself to many abuses, which a public trial would bring to light or more frequently forestall. Such a right as this to a speedy and public trial can be proved not only from reason (as above outlined) but also from authority. In short, it is the doctrine of the Church, as we glean, for instance, from the pronouncements of the Council of Trent and of St. Thomas. The former declares: "Admonet dehinc sancta Synodus tam ordinarios quam alios quoscumque judices, ut terminandis causis quanta fieri poterit brevitate studeant, ac litigatorum artibus seu in litis contestatione seu alia parte judicii differenda modis omnibus, aut termini praefixione aut competenti alia ratione occurant."[77] As for public trial, the Angelic Doctor maintains: "...ideo indiget [homo peccator] judicio publico".[78]

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77. Guérin, P., *Les Conciles Généraux et Particuliers,* 3 Tomes, Paris, 1868, Tome III, p. 508; cf. also Pruner, J-Ev., *Théologie Morale,* Tome II, p. 489.

78. St. Thomas, *Summa Theologica,* II-II Q. LXIV, Art. III ad 2.

The second right, relative to criminal processes, is the right to a trial by an impartial jury of the State and district wherein the crime shall have been committed. Although jury trial may have its disadvantages, nevertheless, as far as the accused is concerned, he is more secure from injustice at the hands of his fellow-men than at the hands of an ordinary judge, and this for several reasons: 1. A board of twelve men, all other things being equal, is open to less chance of error and distorted personal viewpoint than a single individual;[79] 2. The jury judges from intimate conviction, the judge according to the allegations and proofs set forth, even if he should personally believe otherwise;[80] 3. The jury, more cognizant of a person's character, past history, etc., can better judge of the relative responsibility and culpability incurred; etc. To achieve the ends of justice, this jury must be impartial; that goes without saying. Moreover, this impartial jury should be of the State and district wherein the crime shall have been committed, for the simple reason, that a person, tried by his own fellow citizens, would have the benefit of any good reputation which he might enjoy among them. If he is innocent, this surely would work in his favor and would more speedily and certainly promote justice.

In the third place, the one accused of a criminal offense, has the right to be informed of the nature and the cause of the accusation. Such a right is a prerequisite of a fair trial. Not only must there be an accusation, as St. Thomas[81] asserts, but the accused must be informed of the nature and the cause thereof, else how in the name of reason can he defend himself? He cannot defend himself against an accusation that was never made.

The fourth right relative to a criminal process, that must be guaranteed, is the right to be confronted with one's accusers. In the first place, the accused must have witnesses testify against him. St. Thomas succinctly sums up the reason for this by say-

79. *Ibid.*, II-II Q. LXX, Art. II.

80. *Ibid.*, II-II Q. LXVII, Art. II ad 1, 2; Pruemmer, D., *Manuale Theologiae Moralis*, Vol. II, pp. 138, 139, no. 158; Lehmkuhl, A., *Theologia Moralis*, 2 Vol., Friburgi Brisgoviae, 1885, Vol. I, p. 479.

81. St. Thomas, *Summa Theologica*, II-II Q. LXVII, Art. III.

ing: "Est autem probabile quod magis veritatem contineat dictum multorum quam dictum unius; et ideo cum reus sit unus qui negat, sed multi testes asserant idem cum actore, rationabiliter institutum est de jure divino[82] et humano[83] quod dicto testium stetur."[84] Moreover, reason and justice demand not only that witnesses be brought against the accused, but also that he be confronted with them. Only in this way, can he be assured of the fact that witnesses are testifying against him, question their reliability, challenge the veracity of their assertions,—in short, have a reasonable opportunity to defend himself. Does not the Apostle of the Gentiles claim the same right? In "The Acts of the Apostles" it is written of him: "To whom I answered: It is not the custom of the Romans to condemn any man, before that he who is accused have his accusers present, and have liberty to make answer, to clear himself of the things laid to his charge."[85]

The fifth right as regards criminal processes, and perhaps the most estimable of them all, is the right not to be compelled to bear witness against oneself. Much has been written and argued concerning the obligation of self-confession, yet the question is rather simple. To ask a person to bear witness against himself is asking the heroic. To ask him to condemn himself is requiring something very repellent to nature. Now, the State should never require anything that can be expected only of virtuous men. As St. Thomas puts it: "...leges imponantur hominibus secundum eorum conditionem....lege humana non prohibentur omnia vitia, a quibus virtuosi abstinent, sed solum graviora, a quibus possibile est majorem partem multitudinis abstinere".[86] Such, moreover, is the *consensus gentium,* as evidenced alike by Church law and State legislation. Canon 1743.1 states: "Judici

82. *The Holy Bible* (Douay Version), Deuteronomy, XVII, 6; XIX, 15—Numbers, XXXV, 30.

83. Footnote in the Taurini 1915 edition of the *Summa Theologica* of St. Thomas, II-II Q. LXX, Art. II.

84. St. Thomas, *Summa Theologica,* II-II Q. LXX, Art. II c.

85. *The Holy Bible* (Douay Version), Acts, XXV, 16.

86. St. Thomas, *Summa Theologica,* I-II Q. XCVI, Art. II.

legitime interroganti partes respondere tenentur et fateri veritatem, nisi agatur de delicto ab ipsis commisso".[87] As for State legislation, Pruemmer is authority for saying: "...numquam stricte exigitur a juribus modernis civilibus, ut reus accusatus crimen suum fateatur".[88]

The sixth right relative to criminal processes is the right to have compulsory process for obtaining witnesses in one's favor. After all, aside from legal exactions in this regard which bind out of justice or obedience, charity obliges a person to come to the assistance of his fellow man if by so doing he can forestall an unjust punishment. So reason dictates, so ancient[89] and modern[90] theologians alike teach. Moreover, justice demands that, since the State is prosecuting and has at its command whatever it may need to condemn the defendant,—we say, justice demands that the State lend its same powerful assistance to the defendant in mustering together whatever legitimate means he might stand in need of to defend himself in such a prosecution. If the State can force people to uphold its claim, it should also force others to bear witness against it. The State is not an end, it is instituted for the people; in vindicating some, it must not unduly neglect others.

The seventh and final right, relative to criminal processes, is to have the assistance of counsel for one's defense. The reasoning in establishing the moral foundation of this right is similar to that employed in arguing the appropriateness of the preceding right. If the State has the aid of legal advice for the conviction of the accused, it ought to permit and furnish him with the same equal opportunity for his acquittal. So ordinary justice demands; the State is bound not merely to convict the guilty, but also to acquit the innocent. Hence, if the State has a public prosecutor, it must furnish also a public defender or at

87. *Canon Law*: C. 1743.1.

88. Pruemmer, D., *Manuale Theologiae Moralis*, Vol. II, p. 145.

89. St. Thomas, *Summa Theologica*, II-II Q. LXX, Art. I.

90. Lehmkuhl, A., *Theologia Moralis*, Vol. I, p. 488, no. 820; Pruner, J-Ev., *Théologie Morale*, Tome II, p. 493; Pruemmer, D., *Manuale Theologiae Moralis*, Vol. II, pp. 140 sqq., no. 160.

least a lawyer as attorney for the accused, if he cannot furnish any himself. This is in accord not only with reason, but also with the teaching of theologians, past and present. St. Thomas argues that a lawyer is obliged to come to the assistance of the poor gratuitously,[91] while J-Ev. Pruner adds: "...l'accusé a le droit de se choisir un défenseur".[92] What reason dictates and theologians uphold, the *consensus gentium* confirms, since all nations grant this right.[93]

3. OF THE RIGHTS RELATIVE TO COMMON LAW SUITS

Such is the moral foundation of the principal rights relative to criminal processes. The two salient rights as regards common law suits must now be considered. As was mentioned above, the first right in this respect is the right to a trial by jury in the more serious controversies (for instance, where more than Twenty Dollars is at stake). The same arguments, as were advanced above in favor of trial by jury in criminal prosecution, are advanced here in favor of trial by jury in the more serious property suits. Hence, no new ground for this right must here be established, except to say that the more serious property suits are as annoying and harmful to the ordinary individual as criminal processes and, therefore, deserving of the same guarantees of justice, such as the right of trial by jury.[94]

The second common law suit right is the right never to have a fact once tried by a jury to be reëxamined except according to the rules of common law. The reason for such a right is evident; one would never have peace of mind nor security of property if facts could be retried and retried at pleasure. What common law decrees in this regard is the same for both parties and, therefore, as just for the one as for the other. As St. Thomas

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91. St. Thomas, *Summa Theologica,* II-II Q. LXIII, Art. IV ad 3; Q. LXXI, Art. I c.

92. Pruner, J-Ev., *Théologie Morale,* Tome II, pp. 504, 505.

93. Pruemmer, D., *Manuale Theologiae Moralis,* Vol. II, p. 144, no. 162.

94. Cf. Friedman, "Substitute for Jury Trial" in civil cases, in *America,* 36::25 (April 2, 1927), p. 605.

asserts: "...necesse est quod judicium fiat secundum legis scripturam";[95] however, the Angelic Doctor insists that the appeal must be made within ten days and never three times for the same thing, for "...non est probabile, toties judices a recto judicio declinare".[96]

4. OF THE RIGHTS SUBSEQUENT TO TRIAL

The consideration of the foregoing brings us to perhaps the most vital of all rights, namely, those regarding the punishment to be meted out consequent on a verdict of guilt. There is, first, the immunity from excessive bail. Although bail does not follow trial but rather pre-trial, still it is considered here, as it is a sort of punishment and follows a sort of a trial. The right to it has already been seen.[97] What is maintained here is that the bail must not be excessive. The very word excessive expresses injustice; the question, however, is what is understood by excessive? By excessive is understood all that exceeds the amount necessary to assure the appearance of the accused at the trial. After all, that is the end of the bail. If One Thousand Dollars is sufficient to assure a person's appearance at the trial, anything above that amount would be excessive. A given amount is considered sufficient when its forfeiture is considered a greater evil than the punishment of the offense. Hence, in awarding the bail, a judge must consider the gravity of the offense, the nature of the punishment and the wealth of the accused or of his friends. Anything excessive, as the very word implies, is unjust. Bail should not be a punishment, because the person has not been as yet duly convicted; it should be only a safeguard and that within reasonable limits.

The second and the third rights, subsequent to trial, are immunities from excessive fines and cruel and unusual punishments. Cruelty, as St. Thomas says, "importat excessum in puniendo";[98] the Angelic Doctor goes on to quote with approval

95. St. Thomas, *Summa Theologica*, II-II Q. LX, Art. V.

96. *Ibid.*, II-II Q. LXIX, Art. III ad 3.

97. Cf. pp. 166, 167.

98. St. Thomas, *Summa Theologica*, II-II Q. CLVII, Art. I ad 3.

the words of Seneca that "crudeles vocabo, qui puniendi causam habent, modum non habent".[99] Viewed in another light, i.e., objectively, this excess in punishing implies not only cruelty but also injustice,[100] for justice implies a certain equality or proportion.[101] It is for that reason, as was contended above,[102] that punishment in order to be just must be proportionate to the offense and the culpability and responsibility of the agent. It follows, therefore, that any punishment in excess of that would be unjust, besides being cruel if subjectively considered.

Moreover, punishment should be neither excessive nor unusual. This is the thesis, that St. Thomas defends in his treatise on "Vindicatio": "Utrum vindicatio debeat fieri per poenas apud homines consuetas".[103] St. Thomas holds to the same doctrine in II-II Q. XXXIX, Art. II ad 1 of his *Summa Theologica,* where he indirectly teaches that for usual sins usual punishments should be meted out, and for unusual sins, unusual punishments. This doctrine of unusual punishment is in accordanec with right reason and justice. After all, punishment is not an end in itself; it is only a means. If, therefore, an ordinary crime is committed, the ordinary, usual means should be employed to counteract it. Anything else implies excess as to either quantity or quality, and as such is not only cruel but also unjust.

5. OF TWO SUPPLEMENTARY JUDICIAL RIGHTS

In conclusion, the moral foundation of what have been termed "two supplementary judicial rights" comes up for consideration. The first is the right to be justly compensated for the private property that the State may deem necessary to take over for public use. So justice demands, for as Leo XIII[104] maintains, man has by nature

99. Seneca, *De Clementia,* Lib. II, cap. 4 (Cf. Bibliography).

100. St. Thomas, *Summa Theologica,* II-II Q. CLIX, Art. I ad 1.

101. *Ibid.,* I-II Q. CXIV, Art. I c.; II-II Q. LVII, Art. I c. et ad 3; Q. LXII, Art. II; Q. CXXII, Art. I c.; III Q. LXXXV, Art. III c.

102. Cf. p. 154.

103. St. Thomas, *Summa Theologica,* II-II Q. CVIII, Art. III c.

104. Leo XIII, "Rerum Novarum".

the right to possess property as his own, and since he is older than the State, he holds this right of providing for the life of his body prior to the foundation of any State. Hence, the individual's right to property being prior to the State, the latter cannot justly confiscate it. However, since man may not use his property in detriment to others and still less to the superior right of the common good,[105] circumstances may arise when the State is obliged (as the custodian of the rights of others and as the promoter of the common welfare) to regulate and limit private property and even in some cases to appropriate it. But this does not in any way abrogate the individual's rights, for should the State sincerely believe that human welfare demands such appropriation of private property, it is obliged in justice to make due compensation for the same. From which it follows, that, although in principle public ownership may be justified, still in fact it is subject to two limitations.[106]

The first limit is that human welfare must demand it.[107] If the good of humanity does not warrant it, then public ownership is unwarrantable. Now, it may be asked: When does the good of humanity warrant it? Although the answer presents a certain amount of difficulty, what is clear, however, is that human welfare does not require universal or well-nigh universal public ownership, such as is demanded, e.g., by Socialism no matter what be its particular form or name. As the eminent Chief Justice William Howard Taft once said: "Were we to take away the selfish motive involved in private property we would halt, stagnate and then retrograde, the average comfort and happiness in society would be diminished, and those who are now in want would be poorer than ever."[108] The result of such extensive public ownership would be, then, detrimental instead of beneficial to humanity and, therefore, unjustifiable. In principle, the

105. *Ibid.*—St. Thomas, *Summa Theologica*, II-II Q. XXXII, Art. V ad 2.

106. Thus, e.g., Pruemmer, D., *Manuale Theologiae Moralis*, Vol. I, p. 179; Vol. II, p. 6.

107. *America*, 25::14 (July 23, 1921), pp. 322, 323, 324.

108. Taft, W., *Popular Government*, p. 229.

limit is clear; in practice, it is quite another thing and not as easy of solution.

The second limit to public ownership is just compensation. As former President Coolidge once expressed it: "It is a cardinal principle of law that private property should not be taken without fair compensation."[109] Compensation, however, must be considered both as to method and to quantity.[110] To be just, it must be just in these two respects. Hence, a forced loan, levied on the owners by issuing to them State certificates instead of cash, could not be called a just method of compensation. Moreover, not only must the method of compensation be just, but its amount also must be adequate. If public ownership is carried further and further, the difficulty of the owner to reinvest his money received in compensation becomes harder and harder; which is equivalent to saying that he has exchanged productive for non-productive property,—a consideration certainly that must be made in determining the adequateness of the compensation.

In summing up, then, it may be said that, although public ownership is permissible, it is permissible only in so far as human welfare demands it and just compensation can be made.

The last judicial right, that all in these United States may claim, is the right to be free from the obligation of quartering soldiers in time of peace without their consent, and in time of war except in a manner to be prescribed by law. Ordinary justice demands that the sacredness of the home and of private property be respected, unless superior claims direct otherwise. Now, all other things being equal, a State that is efficient should not be obliged in time of peace to thrust soldiers into the home, to disturb its tranquillity and to impose on its hospitality, in a manner that is incompensatable. Besides, it is making the home, in a certain sense, public property—which may not be done, unless human welfare so demands. An efficient State will find other means of quartering its soldiers in peace time. In the event of

109. Cf. *America*, 37::4 (May 7, 1927), p. 77.

110. *Ibid.*, 21::18 (August 9, 1919), pp. 459, 460.

war, however, when conditions are abnormal, it is quite another question; but even then justice dictates that things be done according to certain reasonable and duly promulgated norms.

Section III: Legal Foundation of These Rights

Such, then, is the moral foundation of these judicial rights. As to their legal foundation, it may be laid down as a kind of basic principle, that these rights are the "essential principles of liberty and free government".[111]

In fact, here in the United States, their legal guarantee is most explicit. Every State document speaks of them or implies them.

1. OUR ANGLO-SAXON TRADITIONS

In the first place, the Anglo-Saxon traditions of the American people as regards civil liberty call for most of them.[112] The only ideas, that are in any way characteristic of *American* civil liberty in this regard, are the immunities from bills of attainder and *ex-post-facto* laws.[113] The other judicial rights are, as it were, America's Anglo-Saxon heritage, which esteem for the past obliged the founders of the American Republic to accept and incorporate in their new institution, their transformation of the old to fit conditions of the new or present. In the Magna Charta of 1215 A.D. we read: "Nor will we pass upon him but by lawful judgment of his peers or the law of the land."

2. THE SPIRIT OF THE DECLARATION OF INDEPENDENCE

Is it, then, at all surprising, that the colonists should have declared as their principal grievance for revolting the deprivation of these judicial rights assured to all British freemen? In *The Declaration of Independence* they asserted that: "He[the King of England]has obstruct-

111. Hawes, H., *Lawless Liberty Becomes Tyranny, The K.K.K.*, p. 9.

112. Och. J., *American Political Science* ("The Constitution of the United States"), p. 25, Q. 118.

113. *Ibid.*, p. 26, Q. 121.

ed the Administration of Justice, by refusing his Assent to laws for establishing Judiciary Powers", that "He made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries", that "He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their acts of pretended legislation: For quartering large bodies of armed troops among us: For protecting them, by a mock Trial, from Punishment for any murders which they should commit on the Inhabitants of these States:....For transporting us beyond Seas to be tried for pretended offences...." Could they, then, after having announced these grievances as some of the reasons for their revolt, refuse these same rights to their posterity in their new governmental venture? Ordinary logic and consistency (aside from justice and other considerations) forbade them from doing so.

3. OPPOSITION TO THE RATIFICATION OF THE CONSTITUTION

As a matter of fact, one of the most serious objections to the ratification of the Constitution (as it originally stood previous to the ten Amendments) was that very few specific guarantees as regards judicial rights existed.[114]

4. THE PREAMBLE OF THE CONSTITUTION

To begin with, the very preamble of the Constitution calls for fair play and justice in the defense of rights and the promotion of liberty. What was it that impelled the noble forebears of the American people to establish the Constitution? They assert, in clear and unmistakable terms, that it was to "establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity".[115] Bearing this in mind, can one imagine the Constitution or any

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114. Garner, J., *Political Science and Government,* p. 529, footnote 2—Beard, C., *American Government and Politics,* pp. 85 ff.

115. *Constitution of the United States of America*: The Preamble.

legislation made in conformity with it, assailing ever so slightly judicial rights, rights to a just trial and all that it implies?

5. SPECIFIC GUARANTEES IN THE CONSTITUTION

It is for this reason, that the Constitution in Article III provides for a judiciary, and in various other places throughout the noble document for a specific guarantee of each and every one of the judicial rights, outlined above. Thus, there is the general principle, that no person may be deprived of life, liberty or property without due process of law, and that the powers that be have no right to pass a bill of attainder. These rights are guaranteed in the Fifth Amendment and Article I Section 9 No. 3 respectively.[116]

As regards the various rights preliminary to trial:—Article I Section 9 No. 3 calls for immunity from *ex-post-facto* laws; Article III Section 3 affords safeguards against arbitrary action relative to treason; Amendment V grants the right to be tried for an infamous crime only "on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger";[117] the same Amendment renders one immune from retrial for the same offense after having been previously acquitted thereof; and finally Article I Section 9 No. 2 grants the privilege of *habeas corpus* "Unless when in cases of rebellion or invasion the public safety may require"[118] otherwise.[119]

As for the rights, relative to criminal processes, all of them (except the immunity from self-incrimination) are explicitly guaranteed in the Sixth Amendment. Immunity from self-in-

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116. Cf., e.g., Munro, W., *The Constitution of the United States, A Brief and General Commentary*, pp. 95-114, 143-144, 58-59.—Burdick, C., *The Law of the American Constitution, Its Origin and Development*, pp. 90-143, 406-409, 382.

117. *Constitution of the United States of America*: Amendment V.

118. *Ibid.*, Article I, Section 9, No. 2.

119. Cf., e.g., Munro, W., *The Constitution of the United States, A Brief and General Commentary*, pp. 59-60, 110-114, 140-141, 141-142, 57-58.—Burdick, C., *The Law of the American Constitution, Its Origin and Development*, pp. 382, 380-381, 384-385, 395-399, 381-382.

crimination is assured in the Fifth Amendment, while a second guarantee, for jury trial in the State where the crime shall have been committed, is found in Article III, Section 2, No. 3.[120]

The third category of judicial rights, i.e., those relative to common law suits, are guaranteed in the Seventh Amendment; while the safeguards for rights subsequent to trial are found in the Eighth.[121]

As for the two supplementary rights, (just compensation for public appropriation of private property, and general immunity from quartering of soldiers), Amendments V and III respectively are one's Constitutional protections.[122]

6. SUPREME COURT DECISIONS

Then, of course, there are the Supreme Court Decisions, too numerous even to mention, upholding and reaffirming these basic judicial rights.[123]

STATE GUARANTEES

That judicial rights are safe under the Constitution, there can be no doubt. However, it may be objected that these are but safeguards against the *Federal* Government. True, yet could any *State,* that respects our Anglo-Saxon traditions, the spirit of the Declaration of Independence and the Federal Constitution, provide otherwise? Is it, then, at all surprising that "substantially the same provisions are to be found in the constitutions of the several States"?[124]

In fact, the Federal Constitution obliges them to do so, more

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120. Cf., e.g., Munro, W., *op. cit.,* pp. 145-146, 142, 108-110.—Burdick, C., *op. cit.,* pp. 386-387, 385-386, 382-384, 401, 399-401, 387-390.

121. Cf., e.g., Munro, W., *op. cit.,* pp. 146-147, 147-148,—Burdick, C., *op. cit.,* pp. 404-405, 401-403

122. Cf., e.g., Munro, W., *op. cit.,* pp. 144, 138-139.—Burdick, C., *op. cit.,* pp. 419-421, 377.

123. Cf., e.g., the cases cited by Burdick in the references given in footnotes 116, 119, 120, 121, 122 (Judicial Rights).

124. Hawes, H., *Lawless Liberty Becomes Tyranny, The K.K.K.,* p. 9.—Cf. also Burdick, C., *The Law of the American Constitution, Its Origin and Development,* Part III "The States", pp. 433-617 *passim.*

or less along the same lines. For example, Article I, Section 10, No. 1 inhibits in explicit terms any bill of attainder or *ex-post-facto* law on the part of the State. It is, however, the Fourteenth Amendment to the Federal Constitution that lays down the general principle at the bottom of all judicial rights.[125] It declares: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property without due process of law;*[126] nor deny to any person within its jurisdiction the equal protection of the laws".[127] How any arbitrary, discriminating procedure in court is permissible to the States under this provision, is hard to conceive!

ARTICLE IV — THE AMERICAN PROBLEM AND ITS SOLUTION

THE AMERICAN PROBLEM

As has been already pointed out,[128] the State has a right as well as a duty to protect the individual's rights and to promote the particular and common welfare, by meting out justice to the disturbers thereof. In view of the arguments already advanced, this right and duty of the State to impose a penalty that is reparative, deterring and medicinal is evident.

But if the State has rights, the individual also has.[129] In the vindication of justice, therefore, the State may not act arbitrarily, for the individual also has a right to a fair and a just trial together with everything that that implies. Hence, one finds himself confronted on the one hand by the State's undoubted

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125. E.g., Munro, W., *The Constitution of the United States, A Brief and General Commentary,* p. 143 says: "In a word, due process of law is a synonym for fair play."

126. The italics are ours.

127. *Constitution of the United States of America*: Fourteenth Amendment.

128. Cf. Article II of this chapter.

129. Cf. Article III of this chapter.

right and duty to prosecute the accused, and on the other by the State's equally strict duty to respect and protect the latter's rights from any arbitrary or unjust action in this same prosecution.

To show that both the prosecution and the protection of the accused have been abused, is, in part, the object of this fourth article. Having once proved this contention, it will be imperative to furnish a solution,—a solution that is, at the same time, simple, workable and effective.

1. RIGHTS ATTACKED In the first place, there cannot be any doubt as to the fact that the rights of the accused have been repeatedly attacked. Any one conversant with the past and present history of the United States is aware of this. We may cite, for instance, the passage from the Declaration of Independence quoted in Section III,[130] clearly demonstrating that one of the salient reasons for launching the American Republic was an attack on these rights. Yet, strange to say, an assault on these very rights marked and marred the history of the new governmental venture. We have but to take the numerous Supreme Court Decisions[131] in regard to judicial rights, and to arrange them according to their dates, in order to be impressed by the persistency of the attack launched against one's rights at court.

Or we could take but a page or two from the recent past, then one from the present—the extra lawlessness of our 100 Percenters, the arbitrary reign of Volsteadism, our "glorious" lynching record! Where was "due process of law" and all that that implies under K.K.K. rule?[132] Where was Trial by Jury, not to mention other rights such as Double Jeopardy Immunity,[133] under the 'padlock' clause of Volsteadism?[134] What of the lynch-

130. Cf. p. 177.

131. Cf. Footnote 123 above.

132. Such was the contention, e.g., of U.S. Representative Harry B. Hawes in *Lawless Liberty Becomes Tyranny, The K.K.K.*

133. Cf., e.g., *America*, 36::5 (November 13, 1926), pp. 102, 103.

134. Cf., e.g., *America*, 21::16 (July 26, 1919), pp. 400 ff.; 21::18 (Au-

ing record?[135] In 1921 alone, 92 criminals were executed by due process, while 83 were killed by lynching.[136]

2. RIGHTS ABUSED

Yet, that is only one side of the picture. What of the other? If rights have been attacked, they have also been abused; the protection of the criminal has been over-emphasized, distorted, positively pushed beyond all reasonable and just limits,—with the result that the United States has become the most lawless country in the world. But, are conditions really that bad, and if they are, what has brought them about?

In an article entitled "Reaping the Whirlwind", the following rather startling statements are recorded:—Mr. Casper H. Yost, at the meeting of the American Bar Association in July, 1924, said: "In the United States, life and property are less secure than in any other country on the globe that is not in a state of barbarism".[137] Judge Alfred J. Talley of New York, in an address from the bench on August 11, 1924, asserted: "This is the most lawless country in the world".[138] *The New York Evening World,* commenting on this statement said: "The tragedy of it is that no one will challenge the assertion".[139] In an editorial, felicitously entitled "America First", the *New York Times* laments: "Ten thousand murders a year and other crimes of violence in proportion!"[140] The *New York Herald* (Paris Edition) for August 24, 1926, maintains: "There no longer is talk of a crime wave in the United States. It is not a wave. It is an era".

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gust 9, 1919), pp. 453 ff.; 30::18 (February 16, 1924), pp. 436 ff.; 32::23 (March 21, 1925), pp. 543 ff.; 32::26 (April 11, 1925), pp. 621 ff.; etc.

135. According to *America,* 54:: 15 (January 18, 1936), there were 8 lynchings in 1932, 15 in 1934, and 20 in 1935; 5,000 from 1897 to 1937 (cf. *Ibid.,* 56::20, p. 468, for February 20, 1937).

136. Cf. *America,* 29::21 (September 8, 1923), p. 503.

137. *Op. cit.,* (*America,* 31::19, p. 452 for August 23, 1924).

138. *Ibid.*

139. *Ibid.*

140. *Ibid.*

"Wild statements"? Not if one looks at the record! Thus male prison commitments per 100,000 male population speak for themselves:—1926, 77.5; 1927, 81.6; 1928, 86.9; 1929, 95.3; 1930, 105.5.[141] If we now compare these figures with those for other countries, they look still worse. As Dr. John Lewis Gillin says: "All the figures obtainable show that the United States has an unenviable preëminence in the matter of criminality."[142]

Such, then, are the facts. But what of their cause and of their corresponding remedy? That is indeed a real problem for research and deep concern. To the better solution thereof, let us pass in review the various reasons that are sometimes advanced to explain it.

In the first place, according to some,[143] it is the thoughtless legislature that erects ten barriers for the protection of the criminal to one for the vindication of justice; in the hands of skillful and unscrupulous lawyers, these legal barriers become impregnable citadels against prosecution and the vindication of justice.

Whilst not ignoring altogether the above contention, others[144] are inclined to think that slowness of prosecution accounts for the prevalence of crime. True, the Federal Constitution grants everyone the right to a "speedy" trial; yet this was originally instituted to protect the *innocent* and not the guilty. Being a right of the individual, however, and not a duty of the State, it is his privilege to demand it or refuse it; in point of fact, the first thing that he demands is a delay, convinced by experience that witnesses may die and memories grow faint, so that when his case does come up the witnesses against him will be feeble and unreliable, and public sentiment against him cold and unexacting. Conditions are so bad in this regard, that many are

141. Cf. Gillin, J., *Criminology and Penology*, New York, 1935, p. 28.

142. *Ibid.*, p. 24.

143. Cf., e.g., *America*, 35::13 (July 10, 1926), pp. 293 ff.

144. Cf., e.g., *America*, 33::20 (August 29, 1925), p. 474; 35::9 (June 12, 1926), p. 198; 35::13 (July 10, 1926), pp. 293 ff.; 37::23 (September 17, 1927), p. 544 ff.

of the opinion that the right to a speedy trial ought rather to be a duty, due allowance being made, however, for a reasonable delay.

The third reason, ascribed by others,[145] is the legal profession. There is a well-founded public opinion, more pronounced among certain criminals, that certain ones of the legal profession are only too ready to obstruct rather than to promote the ends of justice by foul and fair means alike; their sole duty seems to them to be to their client; hence, the many "devious and subterranean" means employed by them to thwart justice.

The fourth reason, often[146] adduced in explanation of the crime wave, is the leniency of juries.[147] Jury trial was originally instituted to protect the *innocent,* and not the guilty as it does to-day. As the eminent Judge Alfred J. Talley of New York said on November the 2nd, 1925, to a gathering of the grand and petit jurors: "There is in the jury box today a reaction of the general lawlessness that prevails the country at large. We have men sitting on juries day after day who will not decide cases on evidence, and will not vote to convict guilty men. The one who knows that fact best is the criminal who awaits trial in the Tombs across the Bridge of Sighs. *That is why he is willing*

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145. Cf., e.g., *America,* 34::13 (January 9, 1926), pp. 306 ff.; 35::11 (June 26, 1926), p. 247; 35::16 (July 31, 1926), pp. 366 ff.; 55::7 (May 23, 1936), pp. 147, 148.

146. Cf., e.g., *America,* 30::12 (January 5, 1924), pp. 283 ff.; 34::24 (March 27, 1926), p. 560; 37::14 (July 16, 1927), p. 319.

147. Some add also the *ignorance* of jurors (e.g., Friedman in *America,* 36::14, p. 342 for January 15, 1927; also 38::8, p. 174 for December 3, 1927)—Some think that juries do not judge on evidence, but on sentiment (e.g., *America,* 38::15, p. 376 for January 21, 1928)—In an article, entitled "The Petit Jury" (*America,* 55::8, pp. 180, 181 for May 30, 1936) Alfred A. Duffy says: "The weakness in our criminal law is not in the trial procedure and in the numbers acquitted by the jury, but in the failure of our law enforcing agencies, first to arrest, and secondly to gather together sufficient legal evidence to secure a valid grand jury indictment." (p. 181)—On the perjury of witnesses, cf., e.g., *America,* 54::19 (February 15, 1936), p. 438.

to take the chance—because he knows that jurors will not do their duty".[148]

Occasionally one hears the responsibility of crime shifted to the judges. Such is the view taken by Judge John Barton Payne, formerly judge in a Chicago criminal court and Secretary of the Interior under President Wilson. According to him, the most serious fault in the administration of justice in the United States is "weak, sympathetic and incompetent judges".[149] Whether this is the most serious fault, however, one is inclined to doubt, though that it has conduced to a lax administration of justice is quite evident.

The sixth reason, ascribed for the prevalence of crime, is the ultra-humanizing of prisons and the making of them more or less desirable or at least little-feared places of detention.[150] While no fault is found in the effort to ameliorate conditions that formerly were neither becoming nor just, one need not go to the other extreme and make prisons altogether too pleasant and endurable. Imprisonment is a punishment and should act as a deterrent. As Judge Lewis of Brooklyn once said: "To-day, who hears of a real sentence?...The fear of jail is not a deterrent ....Criminals select and dicker for the institution in which they will be incarcerated. They say 'Send me to Sing Sing. Moving pictures, vaudeville shows and what not of entertainment'."[151]

Akin to this is the seventh reason, also the contention of Judge Lewis[152] as well as of Judge E. P. Burke[153] of the Supreme Court of Colorado, namely that the parole board and the governor's pardoning power often thwart the best ends of justice. If a suitable sentence is imposed on a criminal, "either the parole board intervenes or a governor pardons".[154] As former

148. Cf. *The New York Times*, November 3, 1925, 28:1.

149. In an interview to *The New York World*, December 20, 1925 (Quoted by *America*, 34::12, p. 282 for January 2, 1926).

150. Cf., e.g., *America*, 37::13 (July 9, 1927), pp. 303 ff.

151. Cf. *America*, 34::12 (January 2, 1926), p. 282.

152. Cf. *America*, 34::12 (January 2, 1926), pp. 282 ff.

153. Cf. *America*, 35::16 (July 31, 1926), pp. 366 ff.

154. Cf. *America*, 34::12 (January 2, 1926), p. 282.

Mayor Dever of Chicago[155] remarked some years ago, while Chicago's court in two years sentenced 1,100 to the penitentiary, the parole board during the same period released 950. It was also asserted[156] that a life imprisonment sentence imposed on two of Chicago's notorious young criminals could be by legal means reduced to eleven years. (A horrible prison murder, however, put one of them beyond the possibilities of such leniency).[157] If, then, parole boards and governors are going thus to abuse their discretionary powers, as facts would incline one to believe, then surely crime is going to flourish and justice remain unvindicated. As St. Thomas says: "Judex si inordinate poenam remittet, nocumentum inferret communitati....Noceret etiam personae cui est illata injuria".[158]

Still another reason is advanced to explain the crime wave, and this time the people themselves are blamed. So Justice Burke[159] and others contend. People, in general, do not severely enough condemn crime; there is too much indifference to law violation that does not harm one directly, there is too much foolish sympathy for the criminal and not enough for his unfortunate victims. True, it is hard to admit, yet why should we not be honest? Do not the American people too frequently, if not explicitly at least implicitly, re-enact the Barabbas incident of the Gospel, despite their protestations to the contrary that they

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155. *Ibid.*

156. Cf. *America*, 35::22 (September 11, 1926), pp. 510 ff.

157. For some of the defects of the parole system, cf., e.g., *America*, 54::20 (February 22, 1936), pp. 462, 463.

158. St. Thomas, *Summa Theologica*, II-II Q. LXVII, Art. IV ad 3. From the word "inordinate", it becomes evident that St. Thomas does not fully disapprove of probation, parole and pardon. In fact, from the context of II-II Q. LXVII, Art. IV, we glean that he positively favors them under certain circumstances. Among some of the more recent advocates of clemency within reasonable bounds, we have, e.g.,: Cooley, E., *Probation and Delinquency*, New York, 1926-1927; Spalding, H., *Social Problems and Agencies*, Part I, Chapter XIII; Ayd in *Thought*, Vol. II, No. 1, pp. 148 ff.; Wiltbye in *America*, 36::24 (March 26, 1927), pp. 574 ff.; the Editors of *America*, 37::18 (August 13, 1927), p. 415.

159. Cf. *America*, 35::16 (July 31, 1926), pp. 366 ff.

do not? As Mr. R. L. Calder once said: "I fear that a large part of public opinion in the United States is for the criminal".[160]

Such a cursory examination of the possible causes of the crime wave[161] would logically lead one to the conclusion that the whole judiciary machinery stands in need of an overhauling; all its cogs seem to be jammed, all its nuts loose. However true this may be, these faults are but specific ailments, that an examination brings to light and that take on different proportions according to different view-points. What, however, it may be asked, is at the bottom of them all; what is, after all, the malady aside from its outward manifestations or results as outlined above?

According to the "American Law Institute", whose purpose is "to promote the clarification and simplification of the law", "the two chief defects in American law are its uncertainty and its complexity".[162] Will any one, who has been lost in the meshes of the law, a labyrinth that perplexes at times even the legal profession itself, care to deny this? The very law that seems to protect an individual is proved to be not to the point or even turned against him. What human being is living that is even cognizant of the existence of some of the laws, not to say anything of their vague and intricate meaning? Some enterprising statistician[163] has reckoned that in the United States there are two million laws with 12,000 new ones added annually. And yet, although this uncertainty and complexity seem to be the chief defects in American law, they do not constitute a complete diagnosis of conditions.

The Report of the American Bar Association for August 28, 1923, while taking note of these ailments, states that "our system lacks the three great essentials of law-enforcement: celerity, cer-

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160. Cf. *America*, 36::8 (December 4, 1926), p. 174.

161. To the above might be added also indiscriminate publication of crime. In this regard, cf., e.g., St. Thomas, *Summa Theologica*, II-II Q. XXXIII, Art. VII; *America*, 36::19 (February 19, 1927), p. 445.

162. Cf. *America*, 29::1 (April 21, 1923), pp. 9 ff.

163. Cf. *America*, 29::11 (June 30, 1923), pp. 262 ff.; 32::22 (March 14, 1925), pp. 519 ff.

tainty, and finality".[164] This diagnosis is, by far, more complete, for these are the three essentials that our administration of justice is wanting in. Thus, in addition to the facts above cited, the following statistics are rather enlightening:—Of 146 given murders, 32 were declared "justifiable", while 69 were indicted; of those indicted, only 58 were tried; of these 58, only 41 were declared guilty; of the 41 so found guilty, 35 were sent to the pen, 3 retried, 1 paroled, 1 fined and only one executed,[165] —in short, out of 146 murderers only ONE was executed! This surely is a lamentable commentary on our American law-enforcement machinery!

Complete as this diagnosis of the American Bar Association may at first appear, it does not go to the very bottom of the evil, for it fails to take into account the criminal and other factors. Why is it that these abuses have crept into the administration of justice, why is it that they have been advocated and espoused by the criminal and his sympathizers, why also, in the final analysis, is it that crimes are committed in such large proportions? In this respect, Dr. Fred L. Hoffman, among others, seems to offer the best and at the same time the simplest solution; according to him,[166] the crime wave is due to: (1) A diminishing sense of responsibility to Society; (2) A diminishing sense of self-control; (3) A diminishing sense of responsibility to God for one's actions. Put into other words, it is the neglect of duty to God, self and neighbor. And that is, in the proverbial nutshell, just about the cause of all the trouble, as the sequel will more fully disclose. How, in the name of reason, is one to reform the legislators, lawyers, juries, judges, "ultra-humanitarians", parole boards, governors, criminals and the people at large,—if the sense of duty to God, self and neighbor is absent or at the most vague and meaningless? It is of little avail to

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164. Cf. *America*, 29::21 (September 8, 1923), pp. 502 ff.—In 1928, the American Bar Association advanced eleven reasons for the increase in crime (Cf. *America*, August 11, 1928, pp. 424, 425).

165. Cf. *America*, 31::23 (September 20, 1924), p. 546.—Cf. also footnote 2 (Judicial Rights).

166. Quoted by *America*, 34::13 (January 9, 1926), p. 297.

adjust cogs and tighten nuts in a machine, if the metal itself of which these are made is not of durable quality or suitable form; so also is it the case in the administration of justice—at the bottom of all abuse is the absence of this fundamental and indispensable sense of a threefold duty.

THE SOLUTION

And if this is the case, then the solution of the problem is practically at hand, for the discovery of the real cause of crime is the first and fundamental requisite to eradicating it. To that end, it is the contention of the author, that to impart a sense of this threefold duty the teaching of religion is paramountly necessary. Now, as a matter of fact, for well-nigh close on to a century, the teaching of religion has been banished and barred from the American school house,—and the minds and hearts of American people.

Now, it is the contention of two eminent authorities on Crime and Religion that religious persons do not fill our prisons, that "there is no cause of crime which cannot be offset by purposeful religion, and that no cure for crime is effective which lacks the support of religion."[167]

It is quite clear, then, from this and the following brief but cogent bit of reasoning, that the absence of religion is the cause of the crime wave here in America. Nor is this a merely personal contention. In fact, the consensus of opinion thereon has been recently so universal that it is futile to start quoting.[168]

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167. From a pre-view by Rev. James Meyer of *Crime and Religion* by L. Kalmer and E. Weir, Franciscan Herald Press, Chicago, July 1, 1936.

168. This has been the thesis, for instance, of various writers in *America*, who cite in substantiation of their thesis the statements of eminent public men and organizations. Cf., e.g., 36::4 (November 6, 1926), pp. 78 ff.; 36::6 (November 20, 1926), pp. 136 ff.; 36::7 (November 27, 1926), pp. 161 ff.; 36::8 (December 4, 1926), pp. 184 ff.; 36::12 (January 1, 1927), pp. 276 ff.; 36::16 (January 29, 1927), p. 373; 36::19 (February 19, 1927), pp. 453 ff.; 36::23 (March 19, 1927), pp. 539 ff.; 36::25 (April 2, 1927), p. 589; 36::26 (April 9, 1927), pp. 622 ff.; 37::19 (August 20, 1927), pp. 438 ff. and pp. 447 ff.; 37::22 (September 10, 1927), p. 528; etc.—This was recently brought out also on the floor of the United States Senate by Senators Royal S. Copeland of New York and David I. Walsh of Massa-

Everyone, somehow or other, is beginning to realize that if the ravages of crime are to be checked, religion must be put back in American homes and schools. Children in their formative years must be taught by word and example the idea that there is a God and that to Him as to the Supreme Law Giver they are responsible for their actions; the idea that their neighbor is made unto the image and likeness of God and that they must love him as themselves for love of God; the idea that injury to their neighbor constitutes not merely legal but moral wrong-doing as well; the idea that all authority comes from God and that they must respect it and obey it; the idea that they have an immortal soul and a free will and that on the rational use of the latter in conformity with human and divine law depends their eternal happiness and misery in the next world. Only when such and similar ideas have been thoroughly inculcated and made the principles of living, can one expect his rights to be respected and justice to be meted out to those that attack them. Only then, can one expect an alleviation of the present lamentable conditions relative to the prosecution of the criminal,—the attack on as well as the abuse of judicial rights.

The solution, therefore, of the problem is: A return to the Constitution, the bulwark and custodian of rights, but a return to it through religion and morality, through the inculcation in the home and in the school of the principles at the bottom of all stable and beneficent government. With the Father of Our Country,[169] we firmly believe that "of all the dispositions and habits which lead to political prosperity religion and morality are indispensable supports". With him also we sound the warning: "Where is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths which are the instruments of investigation in the courts of justice? And let us with caution indulge the supposition that morality can be maintained without religion" and that "whatever may

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chusetts; cf. *Congressional Record*, Washington, Vol. 80, No. 37 (February 20, 1936), pp. 2508-2509.

169. Washington, George, *Farewell Address, passim.*

be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle. It is substantially true that virtue or morality is a necessary spring of popular government".

CHAPTER VII

ELECTORAL RIGHTS IN THE UNITED STATES

INTRODUCTION Only two civic rights, namely, to vote and to hold office, remain to be treated. Since these two rights are but two different phases of the electoral privilege, they have been called "electoral rights". Actively considered, the electoral privilege or election means the right to vote, to elect; passively considered, it signifies to be voted for, to be elected. It is for this reason, that the term "active and passive vote" also is used.

But why should a subject, such as this, be treated in a dissertation on *civic* right, if the active and passive vote is properly a *political* right attaching to citizenship? We treat it here, because we use the term "civic rights" in the sense of all those and only those essential rights of the natural law or consequences thereof that the State defines, develops and protects for the common welfare of those, who freely choose *to live within its confines or under its protection* and to partake of its benefits and concomitant burdens and duties".[1] In other words, we use the term "civic rights" in the sense of "the people's rights"[2] in contradistinction to "the government's rights" or "civil rights".

But does not this still further prove that the electoral privilege should not be treated in this work? Moreover, does not St. Thomas say: "Simpliciter quidem civis est qui potest agere ea quae sunt civium, puta *dare consilium vel judicium in populo.* Secundum quid autem civis dici potest quicumque civitatem inhabitat"?[3] Although this is generally true of male citizens of

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1. Cf. p. 37.
2. *Ibid.*
3. St. Thomas, *Summa Theologica,* I-II Q. CV, Art. III ad 2 (The italics are ours).

mature age and fitness, nevertheless, in point of fact, at least in the United States, citizen and voter or office holder are not synonymous terms. Professor James W. Garner says: "There is a large class of citizens in every state who can neither vote nor hold office....On the other hand, aliens in some states are allowed to vote and hold office....The terms 'citizen' and 'voter', therefore, are not identical, since there are some citizens who cannot vote and some voters who are not citizens".[4] In an article entitled "Are Citizens Voters?", John Wiltbye expresses the same opinion when he asserts that "so far as the Constitution is concerned,a voter need not necessarily be a citizen of the United States; nor a citizen of the United States, by that fact, a voter".[5]

It follows, then, that a treatise on the active and passive vote is in place in a dissertation, which is concerned with "the people's rights" rather than with those strictly proper to citizenship (whatever these may be). The treatise is divided into two parts:

Part I: The Active Vote or The Right to Vote
Part II: The Passive Vote or The Right to Hold Office

Part I: The Active Vote or The Right To Vote

The consideration of "The Active Vote or The Right to Vote" is, in turn, divided into three articles:

Article I: The Moral Foundation of the Right
Article II: The Legal Foundation of the Right
Article III: Special Problems As Regards the Right

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4. Garner, J., *Government in the United States,* New York, 1911, p. 383 —The Supreme Court, in Minor *v.* Happersett (1874) 21 Wallace 162, held that the right to vote was not a privilege inhering in citizenship.

5. *America,* 16::8 (December 2, 1926), pp. 177 ff.

ARTICLE I — MORAL FOUNDATION OF THE RIGHT

STATUS OF THE QUESTION

Perhaps there is no other subject, on the nature of which writers are so much at variance, as that of voting.[6] True, unanimity more or less obtains with regard to: Who may vote and who may not, who should vote and who should not, how one should vote and how one should not, and a multitude of similar questions. But when it comes to the seemingly simple query, "What is the vote?", there is perhaps more confusion than enlightenment in the answers that are advanced.

In the sincere hope of dispelling the apparent confusion, this chapter is written. Moreover, it is the author's firm conviction, that the crux of the difficulty lies in not clearly understanding the *origin* of the vote. If this is known, the rest of the problem becomes a mere corollary, easy of solution.

ORIGIN OF AUTHORITY IN THE CONCRETE

In the second chapter, the thesis was advanced that, although all civil authority comes from God, the designation of civil authority does and must come from the consent of the governed. It also was shown that historical origin and juridic title are to be carefully distinguished; that, although in point of fact patriarchal expansion, feudal ownership or conquest may have given rise to the particular State, none of these could adequately explain the juridic title to the rights of sovereignty. It was also pointed out that men are social by

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6. Thus, for instance, we had a very interesting and long drawn out discussion on this question some years ago in *America*:—33::13 (July 11, 1925), pp. 311 ff. (MacGregor); 33::18 (August 15, 1925), pp. 431 ff. (John J. Ryan); 33::19 (August 22, 1925), pp. 456 ff. (MacGregor); 35::22 (September 11, 1926), pp. 520 ff. (MacGregor); 35::26 (October 9, 1926), pp. 616 ff. (John J. Ryan); 36::7 (November 27, 1926), pp. 167 ff. (Whelan); 36::13 (January 8, 1927), pp. 317 ff. (MacGregor); 36::16 (January 29, 1927), pp. 382 ff. (John J. Ryan); 36::20 (February 26, 1927), pp. 478 ff. (MacGregor); 36::22 (March 12, 1927), pp. 526 ff. (John J. Ryan); 36::25 (April 2, 1927), p. 606 (Whelan).—Cf. also, e.g., Garner, J., *Political Science and Government*, pp. 543 ff.

nature and consequently desire and live in Society. Once associated, the duty devolves upon them to procure their common welfare. Now, this duty, like any other duty, presupposes a right to the means that are necessary to fulfill that duty. This obviously implies that either the multitude possesses sovereignty or has the right to designate some one to act in its stead, to procure the common good. Hence, St. Thomas maintains that ordering something to the common good (which is the proper end of Society) belongs "ad totam multitudinem, vel pertinet ad personam publicam, quae totius multitudinis curam habet; quia *et in omnibus aliis ordinare in finem est ejus, cujus est proprius ille finis*".[7] Moreover, St. Thomas observes that this "personam publicam" is none other than the "alicujus gerentis vicem totius multitudinis". It follows, then, that, since a conqueror, a territorial landlord or a patriarch has as end to procure the *individual* or the *family* welfare, he has no natural title to civil sovereignty with its distinctive end to promote the *common* good. The only tenable solution to the problem, then, is that the consent of the governed constitutes the unique title to sovereignty, no matter how diverse its historical origin may be. This was the thesis in Chapter II; this is the contention here. As St. Thomas puts it: "Potestas principum, in quantum talis est, a Deo est"[8] and "Ad populum pertinet electio principum".[9] Or, as Leo XIII renders it: "Quo sane delectu designatur princeps, non conferuntur jura principatus: neque mandatur imperium, sed statuitur a quo sit gerendum".[10] In other words, as far as the origin of authority is concerned, God is the principal, while man is merely the instrumental cause.[11]

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7. St. Thomas, *Summa Theologica,* I-II Q. XC, Art. III (The italics are ours).

8. St. Thomas, *Expositio in Epistolam Sancti Pauli ad Romanos,* XIII, v. 1-7, Lectio I.

9. St. Thomas, *Summa Theologica,* I-II Q. CV, Art. I.

10. Leo XIII, "Diuturnum".

11. Schwalm, S., *Leçons de Philosophie Sociale,* Tome II, pp. 496, 497.

ORIGIN OF THE VOTE in principio, i.e., BEFORE ORGANIZED GOVERNMENT

Our theory on the origin of authority in the concrete implies, if it does not fully explain, the origin of the vote. However, a distinction must be made between the origin of the vote *in principio* or before the establishment of government, and the origin of the vote *in transmissione* or after the establishment of government.

What, then, is the origin of the vote *in principio* or prior to the establishment of organized government? In Chapter II it was demonstrated that authority is absolutely necessary to Society, that it is an indispensable requisite without which Society could neither endure nor attain its end. In the words of St. Thomas: "Oportet igitur esse in omni multitudine aliquod regitivum".[12] If authority is necessary, the designation of authority becomes imperative. But the question is: Where does this designation come from?

It certainly does not come from God, if one excepts the miraculous designation of Moses and his successors as the leaders of the Jewish people.[13] At least there is no other case on record. Nor is this to be wondered at, since God is not wont to do miraculously, what He can do through His creatures.

Moreover, there is no natural designation of the sovereign, for no man in as far as he is man possesses the rights of sovereignty. No man is born a king; all are created equal. As a human being, every man seeks his own individual welfare; in fact, he is opposed to the authority of another as well as desirous of superiority over him. No one, then, as man, has any more right than his fellow man to sovereignty.

Hence, since there is neither a supernatural nor a natural designation, the only hypothesis, that remains, is that it belongs to the multitude to designate who is to exercise authority. Such would seem to be nature's ordinance. With the Rev. S. Schwalm, O.P., therefore, we fully agree in saying: "En règle générale

12. St. Thomas, *De Regimine Principum*, Liber I, Caput I.

13. Cf., e.g., St. Thomas, *Summa Theologica*, I-II Q. CV, Art. I ad 1 et 2.

donc, la multitude, comme telle, désigne le sujet du pouvoir. Et ceci est de droit naturel,—ce droit étant fondé immédiatement sur la nature humaine.''[14]

However, we do concede that there are certain persons and families that would seem by their pre-eminent possession of the necessary gubernatorial virtues and influence[15] to be designated by nature as sovereign. St. Thomas, if not carefully read, would seem to imply this, when he says: ''Si contingat unum totum genus, vel unum inter alios sic differe in genere ab aliis secundum virtutem, ut virtus ejus excedat virtutem omnium aliorum, justum est hoc genus esse regale vel illum si sit unus, et regnum et dominium esse unum omnium; hoc enim est secundum naturam quod ille qui excedit secundum virtutem sit dominus aliorum''.[16] That is true, though it is equally true that this does not constitute a natural designation. It is only ''secundum naturam'', a quasi-natural designation, in as far as it behooves the multitude (if it wishes to act according to right reason, i.e., ''naturally'') to designate such a pre-eminent person or class as ruler. That is why the Angelic Doctor says in the same question: ''Quare relinquitur istum debere principari omnibus et semper, et dominium esse, et omnes illi tali obedire quasi ex inclinatione naturali.''[17]

Such, then, would seem to be the status of the vote, prior to the establishment of government and considered from the viewpoint of juridic title rather than of historical fact. The vote, in some form or other, be it limited or universal, appears to be a natural right of the multitude prior to the formation of the particular State. This is, in substance, what the eminent Cardinal Cajetan, O.P., in his commentary on St Thomas teaches: ''Electio regiminis non est pars regiminis, sed praevium ad omnem speciem regiminis, ad electionem siquidem populi spectat, se-

14. Schwalm, S., *Leçons de Philosophie Sociale,* Tome II, p. 501.

15. E.g., a patriarch.

16. St. Thomas, *In IIIum Polit.,* lectio XVI.

17. *Ibid.*

cundum naturale jus, an populare, an optimatum an regale sit futurum regimen."[18]

ORIGIN OF THE VOTE in transmissione, i.e., AFTER ORGANIZED GOVERNMENT

This logically brings up the consideration of the second phase of the subject, namely, the origin of the vote *in transmissione* or after the establishment of organized government. Naturally, much depends on whether, at the initial institution of government or subsequent approved change thereof, the vote was defined as an essential part of the fundamental law of the State. Still, one could go more deeply into the subject, prescind from historical fact and ask whether the acknowledgment or the denial of the vote in the established government is justified. And this, in turn, leads to the very necessary distinction between what is *per se* and what is only *per accidens* or *propter alia* justified.

In general, it may be said, that there are two ways of transmitting power, namely, by election and by heredity, just as there are, in turn, two modes of election, namely, direct and indirect. It is evident, of course, that there are very many varieties of transmitting power, none ordinarily being purely elective or hereditary. For the sake of clarity, however, all of them may be reduced to these two general basic forms: election and heredity.

What, then, to come to the subject, is *per se* justifiable or natural? We believe that election is, as the following considerations will demonstrate. Every man is endowed with intellect and will. Moreover, he can sufficiently develop these faculties, as also become actuated with such principles of upright conduct, as to be able to choose wisely and conscientiously, undisturbed by passion, those who are to rule over him. Now, reason and experience dictate that such a choice is theoretically more productive of the common good than the fortuitous choice made by heredity. Besides, since it is according to the Divine Plan that

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18. Cajetan, T. de Vio, O.P., *Commentary on the "Summa Theologiae" of St. Thomas* (Cf. Leonine Edition of St. Thomas' *Summa Theologica*, Rome, 1888-1906), II-II Q. L, Art. I.—Or, cf. *Summa S. Thomae cum Commentariis*, Romae, 1773.

man should exercise his faculties of intellect and will when he is thus capable of doing good (for to that end they were given), it follows that man has from nature the right and the duty under such circumstances to choose his rulers. However, this can be the case only of men in a state of sufficient advancement or development; nature alone does not suffice, only sufficiently perfected nature can constitute a title thereto. But, it will be asked: In what does this sufficiency of development consist? That depends: First, on the simplicity or the complexity of the State and of the issues involved; secondly, on the competence of particular individuals to solve these issues by a wise and honest use of the franchise so as to promote rather than to obstruct the common welfare. Now, as a matter of fact, in some States comparatively few people will be so qualified, whereas in others practically all will be so.[19]

The question, therefore, resolves itself down to this: Whether men, because of their natural endowments and acquirements, can or cannot promote the common welfare of their particular State by means of the ballot. If they can, this right should be acknowledged and accorded exercise; if, however, they cannot, this same right, natural though it be, should be suspended. Radically, then, the right to vote must be looked upon as a connatural, natural right; though the right to vote in this or that particular State by this or that individual can be but an acquired, natural right.[20] In this regard, it may be compared to the right of property which, although connatural if considered in the abstract, is acquired if viewed in relation to this or that piece of property.[21] In confirmation of this contention as regards the origin and the nature of the vote, we cite the following statement of the Rev. Charles Augustine, O.S.B.: "...for the right of voting is, radically at least, an inborn right, inherent in a citi-

19. Cf. Schwalm, S., *Leçons de Philosophie Sociale*, Tome II, pp. 507 ss.

20. Leo XIII in "Libertas Praestantissimum" says: "Sic suam conferre operam cives ad tranquillitatem prosperitatemque publicam natura jubet: quantum operae, quo pacto, quibus in rebus, non natura sed hominum sapientia constituitur."

21. Le Buffe, F., *Outlines of Pure Jurisprudence*, p. 80.

zen by the fact of his belonging to the State. And the State we hold to be of natural or divine origin. Hence the clergy, remaining citizens though clerics, cannot be deprived of that *natural right*[22] by any authority, except by way of penalty.''[23]

If election is *per se* justified or natural,[24] what about heredity? With St. Thomas, we are of the opinion, that heredity is only *per accidens* or *propter alia* justified and, therefore, is only quasi-natural. St. Thomas says: ''Est intelligendum quod per se semper melius est assumi regem per electionem quam per successionem; sed per successionem, melius per accidens.''[25] Thus, for instance, because of the low character or development of the voters, the complexity of the State or some other reason, the elective system may be hazardous; while on the other hand, because of the supereminent natural or acquired qualities of the heir to sovereignty, the people's past favorable attitude to heredity or some other reason, the hereditary system may be preferable.[26] *Per accidens,* therefore, (without going into further detail), the elective system may prove harmful and the hereditary in consequence preferable. However, this in no way detracts from the ideal superiority of the elective,—and why not?

Heredity depends solely on a physiological act. The fact, that a person is born of a particular lineage, is no assurance that he is born with the qualities that render him worthy or at least fit to rule. One may just as well be born without these qualities. Birth in itself, therefore, is no reasonable assurance of a wise, prudent and just choice of sovereignty.[27]

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22. The italics are ours.

23. Augustine, C., *A Commentary on the New Code of Canon Law,* 8 Vols., St. Louis, 1919-1922, Vol. II, p. 95, Canon 141.

24. Another argument, advanced in substantiation of this thesis, is the ''cum moderamine inculpatae tutelae'' clause of the principle of self-defense. Thus, John J. Ryan, though not in such terms. (Cf. *America,* 36::16, pp. 382 ff., for January 29, 1927).

25. St. Thomas, *In IIIum Polit.,* lectio XIV.

26. Cf. Schwalm, S., *Leçons de Philosophie Sociale,* Tome II, pp. 517 ss.

27. *Ibid.,* p. 518.

Election, on the contrary, in itself (abstracting from the shortcomings of the particular electorate), is a reasonable choice. Men endowed with intellect and will and using these to the best of their ability choose one, in whom they actually discern these necessary political or regal qualities. Such a choice is reasonable; it is not simply a designation, resultant and dependent on a mere physiological act. It is intellectual, spiritual; the other, merely corporeal.[28]

Such is the author's thesis on the origin and the nature of the vote. Ideally considered, election is superior to heredity; practically viewed, it may need tempering or suspending. In either case, the vote remains a natural right, that men should be allowed to exercise, in as far as they may thereby best promote the common good. The words "in as far" are to be noted, as thereon depends every solution of fact, namely, whether the vote shall be acknowledged or not, whether it should be direct or indirect, universal or restrained, etc.

In conclusion, the following from St. Thomas may be laid down as a basic principle of government, as an ideal to cherish and a goal to achieve: "Unde optima ordinatio principum est in aliqua civitate vel regno, in quo unus praeficitur secundum virtutem qui omnibus praesit; et sub ipso sunt aliqui principantes secundum virtutem; et tamen talis principatus ad omne pertinet, tum quia *ex omnibus eligi possunt,* tum quia etiam *ab omnibus eliguntur.* Talis vero est omnis politia bene commixta ex regno, inquantum unus praeest, ex aristocratia, inquantum multi principantur secundum virtutem, et ex democratia, id est potestate populi, inquantum *ex popularibus possunt eligi principes, et ad populum pertinet electio principum.*"[29]

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28. *Ibid., loc. cit.*

29. St. Thomas, *Summa Theologica, I-II Q. CV, Art. I* (The italics are ours).

ARTICLE II — THE LEGAL FOUNDATION OF THE RIGHT

LEGAL VIEW ON THE NATURE OF THE VOTE

Not only does government here in the United States seem to conform to this Thomistic ideal (as an examination would reveal), but it seems to subscribe also to the Thomistic interpretation (outlined above) as to the origin and the nature of the vote. Amendment XV, Sec. 1, asserts: "The right of citizens of the United States to vote shall not be *denied or abridged*[30] by the United States or by any State on account of race, color, or previous condition of servitude"[31]; while Amendment XIX, Sec. 1, declares: "The right of citizens of the United States to vote shall not be *denied or abridged*[32] by the United States or any State on account of sex."[33] It is evident, then, that the letter as well as the import of these amendments imply that the right to vote is a natural right inhering in sufficiently perfected human nature, prior to and independent of any State grant. In the first place, the very wording of these two amendments ought to be noted. They do not say that negroes and women should be *granted* the right, or that there should be no discrimination in *granting* it; but they assert that the right shall not be *denied or abridged.* This would certainly imply that the Constitution recognizes that negroes and women (and other human beings, for that matter) have this right, prior to and independent of any State grant. Secondly, if the import of these two amendments be considered, the same conclusion follows, namely, that the right to vote is a natural right. Why assert that the right to vote be not denied or abridged on grounds of color, race, previous condition of servitude, or sex, if it is not a

30. The italics are ours.

31. Cf. *Constitution of the United States of America*: Amendment XV, Sec. 1.

32. The italics are ours.

33. Cf. *Constitution of the United States of America*: Amendment XIX, Sec. 1.

right attaching to human nature? Man still is man despite his color, race, previous condition of servitude, or sex; and for that reason the Constitution insists that as a man he shall not be discriminated against in the denial or the abridgment of his right to vote.

Nor is this opinion without juridic support, for some of our Supreme Courts have handed down a similar opinion. Thus, for instance, Justice Marshall of the Supreme Court of Wisconsin, in the case of State *v.* Phelps in 1910 said in part: "If it were true that error could be sanctified by mere weight of numbers or ability of its advocates, and given the character of infallible truth by the mere force of repetition, then the idea that the right to vote is not a right at all, except in the sense of a creature of the law; that it has no inherent quality—would long ago have taken such deep root that no one, much less a court, would hardly venture to make an effort to dislodge it....Formerly, in general conception, there were no rights, strictly so-called. There were privileges which came, directly or indirectly, by grace from sovereign authority. That was the crowning mischief of the Colonial period which was sought to be removed. Hence, at the start, things essential to our welfare which had been enjoyed so far as enjoyed at all, as privileges, were claimed as inherent rights, only surrenderable by the people, or subject to limitation by them by fundamental law. There the standard was reared of a new era, one of inherent rights instead of sovereign graces. To emphasize and make that clear it was declared that all men are 'endowed with certain inalienable rights', specifying some, but not attempting to specify them all....Thus is given the right to vote a dignity not less than any other of many fundamental rights. So it has been rightly said by judicial writers: 'It is a right which the law protects and enforces as jealously as it does property in chattels or lands....The law maintains and vindicates' it 'as vigorously as it does any right of any kind which men may have and enjoy.' State *v.* Staten, 46 Tenn. 233, 241. It is commonly referred to as a sacred right of the highest character and then again, at times, as a mere privilege, a something of such in-

ferior nature that it may be made 'the football of party politics'. We subscribe to the former view, placing the right of suffrage upon the high plain of removal from the field of mere legislative material impairment.''[34] Even more explicit in this regard is the opinion of the Supreme Court of New Jersey In Re Holman (1918), as read by Judge Kalisch. In part, he said: ''It is argued that the right to vote is not an inherent right. As a general proposition, I think it is manifestly unsound, for it is clear that the citizens of a democracy have an inherent right to a voice in their government and to participate in the selection and election of those to be entrusted with the administration of their governmental affairs, and to make laws to govern themselves. This inherent right can only be exercised through the ballot, or by like means, in order to express the popular will. The right to vote inheres in citizenship. The common law did not create the right to vote. The right pre-existed the common law. It is only necessary to point to both sacred and profane history for confirmation of this statement.''[35] Hence, it is clear, that, from a legal viewpoint, the right to vote can be looked upon as a natural right (as, in point of fact, it is according to the reasoning resorted to in the preceding article).[36]

LEGAL STATUS OF THE VOTE

But aside from the legal view as to the nature of the vote, what is in point of fact its legal status? In the first place, it might be said, that democracy postulates the right to vote. In fact, democracy could not exist as such without it, for as long as the people cannot vote they cannot rule and democracy thus becomes a misnomer. The Supreme Court of New Jersey maintains that ''the question of the inherent right of a citizen to vote in a democracy cannot be an open one here'',[37] while St Thomas

34. State *v.* Phelps (1910); cf. 128 N. W. 1041, 1045-1046.

35. In Re Holman (1918); cf. 104 Atl. 212, 213.

36. Such is, in substance, the thesis of John J. Ryan in *America*, 35::26 (October 9, 1926), pp. 616, 617; 36::16 (January 29, 1927), pp. 382, 383.

37. In Re Holman (1918); cf. 104 Atl. 212, 213-214.

says: "Aliud autem regimen est populi quod nominatur democratia; et secundum hoc sumuntur plebiscita."[38]

If the right to vote is essential to a democracy, it is even more so to the democratic venture known as the United States of America. Does not the Declaration of Independence cite unjustified interference in electoral matters as one of the grievances and reasons in justification of the rebellion? It says: "He [the King of England] has refused to pass other Laws for the accomodation of large districts of people, unless those people would relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only.... He has dissolved Representative Houses repeatedly, for opposing with manly firmness his invasions on the rights of the people. He has refused for a long time, after such dissolutions, to cause others to be elected; whereby the Legislative Powers, incapable of Annihilation, have returned to the People at large for their exercise; the State remaining in the mean time exposed to all the dangers of invasion from without, and convulsions from within...."[39]

In view of these facts, is it at all surprising that the framers of the Constitution of the newly formed republic should have provided along broad general lines for an electoral form of government? To that end Article II, Section I, Paragraphs 1 and 2 ordain: "The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice President, chosen for the same term, be elected as follows: Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the State may be entitled in Congress."[40] Moreover, as regards the election of United States Senators, Amendment XVII, which supersedes Article I, Section III, Paragraph 1, prescribes: "The Senate of the United States shall be composed of two Senators from each State, elected

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38. St. Thomas, *Summa Theologica,* I-II Q. XCV, Art. IV c.

39. Cf. *The Declaration of Independence.*

40. Cf. *Constitution of the United States of America, loc. cit.*

by the people thereof for six years."[41] A similar prescription for the election of United States Representatives is found in Article I, Section II, Paragraph 1, which says: "The House of Representatives shall be composed of members chosen every second year by the people of the several States."[42] In view of these Constitutional provisions, it is evident that United States government is an electoral form of government, and that the people here in the United States have the right to vote, at least in as far as the election of President, Vice President, United States Senators and Representatives is concerned.

If, then, the right exists, it may be asked: By whom is it conceded and to whom is it extended? In the first place, what seems to be the universal consensus of opinion (based on the clear wording of the Constitution)[43] is that the right to vote is not a Federal but a purely State affair. The fact, that a person is a citizen of the United States, does not entitle him to the exercise of the right of suffrage; it is for the particular State to decide whether he is to vote. Relative to this, Justice Peckham in Pope *v.* Williams said: "In other words, the privilege to vote in a State is within the jurisdiction of the State itself, to be exercised as the State may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals in violation of the Federal Constitution."[44] A similar decision was handed down in Minor *v.* Happersett, inasmuch as it declared that the right to vote is not a right springing from Federal citizenship.[45] Nor is it at all surprising, in view of the very wording of the Constitution, that this should have been the decision of the courts. In each of the Sections above cited (namely, Art. II, Sec. I, Parag. 1 & 2; Amendment XVII; Art. I, Sec. I, Parag. 2) relative to the election of President, Vice President, United States Senators and United States Representatives, it is

41. *Ibid., loc. cit.*

42. *Ibid., loc. cit.*

43. Cf., e.g., Burdick, C., *The Law of the American Constitution, Its Origin and Development,* pp. 612-615.

44. Pope *v.* Williams (1904), 193 U.S. 621, 632.

45. Minor *v.* Happersett (1874), 21 Wallace 162.

explicitly mentioned that the qualifications of the electors shall be determined by the State. It follows, then, that the *exercise* of the suffrage is a State and not a Federal concern.

Although the State may regulate the qualifications of the electors, the Federal Government does exercise a certain amount of control. In the first place, it strenuously objects to any denial or abridgment of the right to male citizens of 21 years of age; in fact, it so strenuously objects to this, that it lays down in Amendment XIV, Paragraph 2 the following penalty: "But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein [i.e., in the United States House of Representatives] shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State."[46]

Not only does the Federal Government object to the denial or the abridgment of the right to vote to male citizen inhabitants of twenty-one years of age, but it also expressly ordains that citizens be not discriminated against in regard to the suffrage because of reasons of race, color, previous condition of servitude or sex. So Amendments XV and XIX prescribe.

Voting, then, although a State affair, still finds safeguards in the Federal Constitution. If States would limit the suffrage of male citizen inhabitants of twenty-one years of age, they must suffer the penalty. Moreover, in denying or abridging the right, they may not discriminate because of sex, race, color or previous condition of servitude. Outside of these limitations, the State constitutionally is supreme in regulating the exercise of the suffrage. Thus, for instance, there may be property or educational requirements, and in point of fact there are. Yet all such limi-

46. Cf. *Constitution of the United States of America, loc. cit.*

tations (as shall be shown in a subsequent article) can be reconciled with the theory that the right to vote is a natural right.

In such esteem is the right to vote held, that a veritable mass of supplementary legislation has been instituted to safeguard it against fraud and other corrupt practices of all sorts. Thus, for instance, in nearly all States there exist minute regulations with regard to campaign expenses, registration, the time, place and manner of holding elections, the form and use of the ballot, formalities of voting and of counting the ballots, etc. All these regulations have as sole object to guard against such abuses of the right as: the use of separate ballots printed by the candidate or the party and the distribution thereof before election day; congregation within the poll zones to aid and influence the voters; bribery, treating, intimidation and other illegitimate ways and means of influencing the voters; lack of secrecy; double voting; ballot box "stuffing"; etc. And yet there are so many other possible ways of abusing the right, that there is need of even more legislation as regards this matter. What the existing legislation, however, emphasizes, is that the right to vote in the eyes of the law must be something justly worthy of esteem and protection, and that the right must be fundamental and the consequences of its exercise far-reaching.

To sum up, then, the right to vote not only exists here in the United States but is guaranteed in the Federal and the State Constitutions alike. In fact, both the right and its guarantees are called for, by the Declaration of Independence and the establishment of a democratic form of government.

ARTICLE III — SPECIAL PROBLEMS

The true nature of the right to vote is more fully disclosed, once certain problems with regard to the exercise of the right of suffrage are solved. There are principally four such problems, namely: Limitation of the Vote, The Duty to Vote, Compulsory Voting, The Manner of Voting.

LIMITATION OF THE RIGHT TO VOTE

In the first place, then, what is to be said about the question of the Limitation of the Vote? True, it has already been touched upon in the two preceding articles; yet, we feel, it must be more fully treated here, as it is so often advanced against the thesis that the right to vote is a natural right.[47]

To understand the difficulty more fully with a view to solving it more satisfactorily, a cursory examination of its historical aspect may here prove useful. Thus, we are told, that at the beginning of our republic, the electorate was limited to a mere one twenty-fifth[48] of the entire population. In each of the thirteen original colonies there existed some limitation or other, based in some on the owning of a certain amount of property or the paying of a certain amount of taxes, and in others on the adherence to the Protestant religion. Thus, in New York the voter had to have a freehold estate of Thirty Pounds or a house rent of Forty Shillings; in New Jersey, indiscriminate of sex, color or nationality, the owning of Fifty Pounds or real estate qualified one to vote; in South Carolina, the voter had to be a free white man, believing in God and a future state of reward and punishment, besides fulfilling certain property and tax qualifications; in Georgia, every male white inhabitant had not only the right but also the duty to vote under a penalty of Five Pounds. And so the conditions for voting, that existed in the other original colonies,[49] could be here enumerated; however, the above is sufficient, we believe, to show that certain conditions relative to property, taxes, religion, etc. did exist, and in fact to such an extent that the electorate was reduced thereby to a mere twenty-fifth of the total population.

In 1868, the Fourteenth Amendment was adopted, forbidding

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47. Thus, for instance, MacGregor in *America*, 36::20 (February 26, 1927), pp. 478 ff.; refuted by Ryan in *America*, 36::22 (March 12, 1927), pp. 526 ff.

48. Taft, W., *Popular Government*, p. 13.

49. Cf. *Ibid.*, pp. 12, 13—Cf. also, e.g., Beard, C., *American Government and Politics*, pp. 455, 456.

discrimination on grounds of race, color, or previous condition of servitude, and ordaining under penalty the extension of the suffrage to male citizen inhabitants of twenty-one years of age. The result, although other factors contributed, was striking, for, whereas formerly only one twenty-fifth of the total population were qualified to vote, now one fifth were.[50] Woman suffrage in 1920 raised the number to one third.[51]

Even at the present time many are barred from voting, by qualifications as various as are the States that insist on them. Thus, all fix the age for voting at 21; all have some residence requirement; nearly all insist that the voter be a *bona fide* citizen of the United States; about one half set some educational test or other; some even demand a poll-tax; others bar the criminal, the insane, the public pauper; etc.[52] But are such restrictions justified?

As was mentioned above, such restrictions can be not only justified, but at times even necessary. After all, while the right to vote is a natural right, only those should be permitted to exercise it who are able to understand adequately and thereby promote effectively, the interests of their particular community. Thus, if by the exercise of the right to vote the common good would be better promoted, the use of this right should be accorded; if, on the other hand, the common welfare would be impaired, its use evidently should be curtailed or suspended. Such is the basic electoral policy, that reason dictates. Naturally, much depends on the relative simplicity or complexity of the particular community and of its problems, and the competency of the potential elector to solve them.

Nor does such limitation in any way impair the naturalness of the right. The fact, that the State may limit the right to vote, does not mean that the right is not natural. Thus, e.g., no one that admits the existence of natural rights as such would

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50. Cf. Taft, W., *Popular Government*, p. 14.

51. Cf. Taft, W., *op. cit.*, p. 14.

52. Cf., e.g., Beard, C., *American Government and Politics*, pp. 499-503; Garner, J., *Political Science and Government*, pp. 572-580; Hall, M., *The Student Voter's Manual.*

deny that the right to marry belongs to that category; yet, no one would dare to assert that he has the right to marry this or that particular person. That depends on the other party. The one must measure up to the other's conditions and vice versa; then only is the marriage arranged and entered into. Besides, it may be remarked, that the Church, the staunchest upholder of the marriage right, nevertheless lays down minute and manifold regulations or impediments in its regard. Another parallel case is the right of property, which also must be acknowledged to be a natural right; yet, if I want the right to hold this or that piece of property, I must fulfill the conditions of the one who has the title thereto. Thus, in the two examples cited, the right still exists, though its exercise in the particular instance depends on the other party to the contract, who in all justice may impose the fulfillment of certain conditions. However, it is evident that if the other party is unreasonable in his demands, an injustice is done. So also is it in the State. Man, in virtue of his nature, has the right to vote, yet he may do so, only in so far as the State permits him. If, in the opinion of the State, he cannot thereby most efficiently promote the common good, then he must be prohibited by the State (as the custodian of the common good) from voting. Of course, as in the examples above cited, the State must be reasonable in its demands, else an injustice is done. And so it becomes clear, that limitation in no way impairs the naturalness of the vote. Like the right to marry and the right to hold property, the right to vote is a natural right; nevertheless, like them, in the particular case, it is but a natural *acquired* right, i.e., something that springs from the deed of man whether on his own part or on that of others in his behalf, something annexed to his personality, something that has come to him in virtue of something apart from his very existence as a person.[53]

Nor is this contention devoid of juridic support. As former Chief Justice William Howard Taft once said: "We are in favor of a rule by as many of the people in a democracy as will secure

53. Cf. p. 24.

a good government and no more. The result will be good because it secures the happiness of the individual. Government is a means to an end, and the means are to be selected on account of their adaptability to the end.... If the advocates of female suffrage'' [and we may say parenthetically that this may be applied to any other extension of the suffrage] can show that they, as a class, have been unjustly prejudiced by governmental measures or by lack of them, and that they would remedy this by their vote, or if they can show that, by the extension of the franchise to women, either the general Government would be better or stronger, or the existing electorate would be improved in its average moral tone, its intelligence, its political discrimination, its patriotism and attention to political duties, they make their case; and they do so *because they thus establish that the addition of them to the electorate is a useful means to secure the happiness of the individual.''*[54]

THE DUTY TO VOTE

The second problem, that calls for consideration here, is The Duty to Vote.[55] Indeed, the subject is of such timeliness and importance, that a few statistics in this regard might prove provocative. Thus, in the fall of 1924, there appeared a veritable deluge of imposing statistics and vehement utterances of all sorts on the negligence and apathy of the American electorate. Among other studies, a rather detailed and startling tabulation of the presidential vote of 1920 was made in a thesis submitted to Swarthmore College by H. L. Hutchinson; therein, it was pointed out that of a total population of 105,273,049 only 26,654,666 or a bare 25.3% went to the polls to vote. The figure was so startling that it allured Paul L. Blakely, S.J., into analyzing it,[56]—with these results: After making due allowance for 44,842,100 minors and 6,646,699 foreigners, the 25.3% above quoted really repre-

54. The italics are ours. Cf. Taft, W., *Popular Government*, pp. 15, 16.

55. Among the more recent works on this subject, that the reader may find useful to consult, is R. P. Coulet's excellent book entitled: *''L'Eglise et le Problème Politique*, Paris, 1922, pp. 53-97.

56. Cf. *America*, 30::20 (March 1, 1924), pp. 483, 484.

sented 48% of the electorate. Various suffrage requirements in the Southern States and educational tests in some of the Northern States disqualified another 4,100,000; illness accounted "for the non-appearance at the polls of an additional 450,000"; inclement weather explained the absence of 220,000, while traveling prevented about 500,000,—in all 5,270,000 were thus disqualified. But the deductions do not end here; property qualifications and poll-tax possibly accounted for the abstinence of 200,000, while prisoners of voting age and inmates of institutions for the feeble-minded and insane totaled 350,000. The newly-instituted woman suffrage ten weeks before election day, with its novelty and unwelcomeness for some and its six months' registration for others, also wrought havoc with the electorate in 1920. And thus it was reckoned that while only 48% of the *de jure* electorate voted, still 59% of the *de facto* used the suffrage. Moreover, in certain States the pre-election assurance of defeat or victory convinced many others of the futility or uselessness of casting a vote. It becomes evident, therefore, that conditions in the 1920 Presidential Elections were not as black as they were at first painted, though black, indeed, they remain.

Among those who bemoaned the conditions and sounded a note of warning was the Federal Council of Churches. It pointed out,[57] among other things, that in St. Louis in 1920 only 49% of the 300,000 registered voters went to the polls and that only 28% voted on the new constitution; that in Massachusetts in 1922 one sixth of the electorate chose the state officials; that in the same year thirty-three governors were elected by two-thirds of the qualified voters; that in Philadelphia in 1923 only 49% and 26% of the qualified men and women voters respectively exercised the right of suffrage; etc.

The National Manufacturers' Association was another that raised its voice in protest in the general Get-Out-the-Vote Campaign for the fall of 1924. The Association called attention to the fact that the percentage of votes cast was on the decline;

57. Cf. *America*, 31::20 (August 30, 1924), p. 483.

thus, in 1896, it was 80%; in 1900, 73%; in 1908, 68%; in 1912, 62%; and in 1920, 49%.[58]

In view of these figures, it is not at all surprising that people began talking about the *duty* to vote, so much so in fact that its aspect as a *right* has been almost wholly lost sight of. But one may ask, after having read the preceding part of this chapter, whether the exercise of the suffrage is really a duty, and if so, how it conforms with the theory already advanced that the suffrage is a right. This is, indeed, a problem!

That the exercise of the suffrage is a duty and a serious duty, there cannot be the least doubt. Aside from any moral considerations strictly so-called, the very idea of democracy postulates it, for without the exercise of the suffrage on the part of the people democracy degenerates into a rule of the few and not infrequently even into oligarchy. The difficulty seems to be that many people do not sufficiently grasp the true idea of democracy, do not realize what it means and what duties it entails. Now, democracy, rightly understood, is a polity that looks upon each citizen as a unit of government, that looks to each one for the choice of representatives to conduct public affairs, or for more direct action in the use of the initiative and referendum. The affairs thus tended to are the people's affairs, the representatives who run the government are their agents, selected by them to promote their common welfare. This is the essence of democracy, the rule of the people, for the people and by the people. When the people fail to realize its import and the duty it imposes upon them to participate in government by the use of the ballot, then democracy fails and falls and oligarchy ensues. And so it is that the American democracy is fast becoming a rule of the few, if the above and other similar statistics mean anything.[59] What must be done, then, is to impress upon the people the true idea of democracy and what it implies, or else pray God that the ruling minority be the better class of Society. Without

58. *Ibid.*

59. Cf., e.g., *America*, 30::20 (March 1, 1924), pp. 483 ff.

the exercise of the vote, democracy fails, for it is an essential thereof, its *sine qua non,* its primary duty.[60]

Such are but a few minor considerations on the existence of the duty to vote in a democracy. What, however, is its theological basis? The whole question, we believe, can be summed up in the principle of moral: "Sic utere suo ut alienum non offendas." This principle evidently implies that, although one has rights, these rights are limited. In studying the Limitation of Rights in Chapter I, this same conclusion was arrived at and enunciated, namely, that rights are limited and that in a twofold manner: First, by the end for which the right has been conceded; and second, by the duties that the subject of the right may be bound to observe. In this twofold limitation is bound up the present thesis that the duty to vote is based on legal justice and on charity.

Such is, in general, the thesis of Vermeersch[61] and more at length of the author of a series of articles appearing in the *L'Ami du Clergé* for 1903[62] and1904.[63] In the first place, legal justice obliges one to use the suffrage. Legal justice, St. Thomas says, "ordinat hominem immediate ad bonum commune",[64] and, hence, may be defined (subjectively considered) as the constant and enduring determination of the citizen to render to the State its due, by acting so as to promote or at least not to obstruct the common good.[65] Now, the right to vote has been ingrafted on human nature by God and granted exercise by the State, with this sole end in view of promoting the common good, for otherwise the right to vote would have no "raison d'être". But, to neglect to vote is to injure the individual and more particularly

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60. Cf. Tanquerey, Ad., *Synopsis Theologiae Moralis et Pastoralis,* Vol. II, p. 475.

61. Vermeersch, A., *Theologiae Moralis Principia, Responsa, Consilia,* 3 Vol., Romae, 1921, Vol. II, p. 88 no. 117.

62. *L'Ami du Clergé,* Tome XXV, pp. 979 ss.

63. *Ibid.,* Tome XXVI, pp. 2 ss.

64. St. Thomas, *Summa Theologica,* II-II Q. LVIII, Art. VII.

65. Cf. Le Buffe, F., *Outlines of Pure Jurisprudence,* p. 120; *L'Ami du Clergé,* Tome XXV, p. 980.

the common good; on the proper exercise of the vote depends in large part, if not entirely, the character of the government. Hence, to neglect to vote is to impair the general good and, therefore, to fail against legal justice which has this as object to promote. Or the same argument may be put into the following syllogistic form, the premises of which have already been sufficiently proved: Legal justice prompts a person to promote the common good in every reasonable way. Now, the exercise of the suffrage is a reasonable way for promoting the common good by the choice of worthy candidates or the passing of needful laws. Therefore, legal justice prompts a person to use the suffrage, or else to incur moral guilt if he unjustifiedly neglects to use it.[66]

Not only does legal justice oblige one to vote, but charity also exacts that of him. In virtue of charity, one is bound to love his neighbor as himself; the duty of charity is incumbent on all and as such must be reckoned as one of the duties limiting rights (as above noted). Now, in neglecting to vote, one positively harms his neighbor or at least fails to promote his greater good,[67] though this effect of one's neglect be only confusedly foreseen, and the resultant harm be only indirect. How much harm, after all, is effected or good forestalled by neglecting to vote for a proper candidate or a needful law? But charity demands that one do all in his power to forestall this ill or to promote this good, and, therefore, to use the ballot, if this is the only effective means to this end.

The duty to vote, then, flows from legal justice and charity. That it is a serious duty, no one will question, especially if he considers its far-reaching consequences and possibly harmful effects. So serious, in fact, is it, that "un vieux moraliste", as he calls himself, goes so far as to say: "En règle générale ce devoir est incontestable. S'il ne figure pas dans les listes des com-

66. Cf. Ryan, J. A. and Millar, M., *The State and the Church*, p. 271; Noldin, H., *De Principiis Theologiae Moralis*, 3 Vol., Innsbruck, 1910-1911, Vol. II, p. 341.

67. St. Thomas, *Summa Theologica*, II-II Q. LXIII, Art. II ad 3.

mandements de Dieu et de l'Eglise c'est qu'à l'époque où ces listes ont été dressées le cas du devoir électoral ne se posait pas. Il mériterait bien d'y être inscrit aujourd'hui comme un des préceptes fondamentaux dont l'accomplissement importe le plus au bon ordre social, et, par contre coup nécessaire, à la bonne conduite morale des individus."[68] While the "vieux moraliste" here seems to forget all about the omniscience of God or the wisdom of His Church, he but otherwise expresses what the American Hierarchy less forcibly reiterated some fifteen years later in their National Pastoral Letter for 1919. They said: "Each citizen should devote a reasonable amount of time and energy to the maintenance of right government by the exercise of his political rights and privileges."[69]

Since the very nature of this dissertation demands that the vote be considered as a right rather than a duty, the above will have to suffice here on the subject. However, it may be said in conclusion, that in certain cases one may be excused from exercising the right by a proportionately grave reason.[70]

COMPULSORY VOTING Closely akin to the preceding subject of the duty to vote, is that of compulsory voting. So general, in fact, has been the neglect to vote, that there has been much agitation in recent years for compulsory voting. Thus, Belgium, Roumania, Spain, Argentina, the Netherlands, Czechoslovakia and some of the Swiss cantons have tried it, though with varying results, some good, some bad.[71] Some years ago, the commissioner of jurors of New York City advocated it, asserting that non-voters would be placed on the preferred list of jurors and would be called upon for service before others.[72]

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68. Cf. *L'Ami du Clergé,* Tome XXV, p. 980.

69. Cf. Guilday, P., *The National Pastorals of the American Hierarchy, 1792-1919,* p. 327.

70. Tanquerey, Ad., *Synopsis Theologiae Moralis et Pastoralis,* Vol. II, p. 476; Noldin, H., *De Principiis Theologiae Moralis,* Vol. II, p. 341; *L'Ami du Clergé,* Tome XXV, p. 981.

71. Garner, J., *Political Science and Government,* pp. 548-551.

72. Cited in *America,* 36::1 (October 16, 1926), pp. 6 ff.

That compulsory voting has its merits, if the only one is to impress upon the electorate the importance of the suffrage, there cannot be any doubt. Yet, such a system would do more harm than good;[73] many would vote because they have to and this certainly would not make for an intelligent and honest vote. If people vote, they should vote intelligently and honestly; the compulsory vote would effect the contrary. Then, again, people can be forced to go to the polls, but they cannot be forced to vote. In fact, this is what actually happened in Switzerland; many people turned in blank ballots[74], as they either felt incompetent or were uninterested in the issues at stake.

What is needed is not compulsory voting with its possibly baneful effects, but more preaching on the moral obligation and the sacredness of the suffrage.[75] Without this, all other methods fail, for this alone will bring about the desired effects, i.e., not only a big vote, but also an intelligent and honest vote. If compulsory voting seems to teach anything, it is that something must be wrong with the electoral system, else why are people so uninterested or disgusted with the issues that they fail to vote. That the ballot must not be made an undue burden by the length and the unintelligibility of the issues,[76] or by the unworthiness of the candidates and the laws proposed,[77] or, by the impression that the whole political system is rotten—such would seem to be the lesson taught by the neglect of the suffrage. However, this would in no way excuse such neglect.

THE MANNER OF VOTING The fourth and final problem, that presents itself for consideration here, is how one should vote, if he is permitted to vote. As mentioned above, the moral principle, "Sic utere suo ut alienum non offen-

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73. Cf., e.g., Lapp, J., *The American Citizen,* p. 41; *America,* 31::20 (August 30, 1924), p. 475; cf. also Garner, J., *Political Science and Government,* pp. 550-551.

74. Taft, W., *Popular Government,* p. 19.

75. Thus, for instance, the annual letters in recent years of Archbishop John T. McNicholas of Cincinnati.

76. Taft, W., *Popular Government,* pp. 41, 51-54.

77. *America,* 36::4 (November 6, 1926), p. 79.

das'', here holds good, for in the exercise of the right of suffrage one is not justified in impairing either the individual or the common good. To forestall such injury, however, it becomes necessary not only to use the vote, but also to use it properly. In the first place, one should vote intelligently and carefully, for a negligent, haphazard vote is in many cases equivalent to a bad, a corrupt vote.[78] How often does it happen, that people mark their X, when they know little or nothing about the person or the issue voted for! They go to the booth simply to assert their right, or for some other ulterior and worthless reason; but they do not at all mark their ballot as it befits a human being to do so; they vote, but not intelligently. St. Thomas observes ''electio sequitur inquisitionem in hominibus''.[79] Would that that were the case, when people vote! The voter is in conscience bound to acquaint himself with men and issues,[80] to find out whether the candidate for office is competent and honest, whether the issue to be voted on is for the common welfare, etc. A cursory glance at the ballot will not suffice, nor a passing remark of a pedestrian, nor the fervid misleading harangue of a politician. Rather, one should read reliable articles, listen to trustworthy advice, and then only go to the polls to perform what should be a human, an intelligent act fraught with momentous consequences.[81] After being rightly instructed, one should mark his ballot with care, lest a hurried performance of the formality should result in voting for the opposite issues or having the vote cast out because of some technical fault or other. Carefulness in marking

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78. Cf. *America*, 19::26 (October 5, 1918), p. 626; 32::1 (October 18, 1924), p. 15; 38::11 (December 24, 1927), p. 255.

79. This is the thesis, that St. Thomas enunciates in his *Summa Theologica*, I Q. LIX, Art. III ad 1; III Q. XVIII, Art. IV ad 2; III Q. XXXIV, Art. II ad 2.

80. The National Pastoral Letter for 1919 exhorts: ''He [each citizen] should understand the issues that are brought before the people, and cooperate with his fellow-citizens in securing, by all legitimate means, the wisest possible solution.'' (Cf. Guilday, P., *The National Pastorals of the American Hierarchy, 1792-1919*, p. 327).

81. Cf. Ryan, J. A. and Millar, M., *The State and the Church*, p. 269.

the ballot is as important as intelligence in determining the choice; without it, the other is rendered useless.[82]

Not only should the choice be intelligently made and carefully recorded, but it should also be honest and free. To sell votes or to vote for persons or issues solely because of past or expected favors is not honest; it is reprehensible, downright sinful. One too often hears the fallacy advanced that politics and morality are divorced, not merely in fact but also *in se*. Indeed, so generally does this opinion obtain that the American Hierarchy deemed it necessary to censure it thus in its National Pastoral for 1919: "The idea that politics is exempt from the requirements of morality, is both false and pernicious: it is practically equivalent to the notion that in government there is neither right nor wrong, and that the will of the people is simply an instrument to be used for private advantage."[83] To vote for an unworthy candidate,[84] despite one's convictions as to the said candidate's unworthiness, is doing injury to the common good, violating Society's strict right to a worthy and just administration.[85] Equally reprehensible, though not always fraught with such pernicious results, is the base act of selling one's vote,[86]—base because money then prostitutes mind, resulting in a human act, it is true, yet not worthy of a human being. Also reprehensible is the custom that obtains even among well-meaning citizens of electing their friends, fellow townsmen or co-religionists in preference to others solely or principally on such grounds. Yet,

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82. On the necessity of the clergy instructing the people, cf., e.g. Pruemmer, D., *Manuale Theologiae Moralis,* Vol. II, p. 98 no. 105 (a); *L'Ami du Clergé,* Tome XXV, pp. 818 ss.

83. Guilday, P., *The National Pastorals of the American Hierarchy, 1792-1919,* p. 326.

84. As regards the reparation to be made, cf., e.g., Pruemmer, D., *Manuale Theologiae Moralis,* Vol. II, p. 98; Vermeersch, A., *Theologiae Moralis Principia, Responsa, Consilia,* Vol. II, pp. 334, 335; Tanquerey, Ad., *Synopsis Theologiae Moralis et Pastoralis,* Vol. II, pp. 227, 228.

85. Cf., e.g., Vermeersch, A.,*Theologiae Moralis Principia, Responsa, Consilia,* Vol. II, p. 89.

86. Cf., e.g., Tanquerey, Ad., *Synopsis Theologiae Moralis et Pastoralis,* Vol. II, p. 476.

one is bound to vote for the *common* good and not for one's own or another's own *personal* advantage or aggrandizement. Such is the teaching of the Angelic Doctor (among others),[87] as outlined with more finesse in his question on "De Acceptione Personarum".[88] Personal predilections and inclinations should not figure solely or even mainly in one's vote. Such and similar[89] abuses render one's vote dishonest and, hence, any such exercise of the right unjustifiable.

The vote should be not only honest but also free. In fact, the vote that is not free is no vote, for where there is no choice (aside from the mere material marking of the ballot) there is no vote. As St. Thomas puts it: "Proprium liberi arbitrii est electio."[90] Moreover, in order that the vote be free and honest, it must be secret, for it is expecting entirely too much of the average person to be free and honest without secrecy.

To sum up, then, the exercise of the suffrage right should be intelligent, careful, honest and free. To be effective it should also be organized.[91] For the better class of the electorate to be divided because of minor differences, is proffering the other class of the electorate a too dangerous opportunity of putting in their man or measure. The better people should forget their minor differences and muster their total strength for a common cause. Then only will their individual, intelligent, careful honest and free vote count for anything.

A word of caution must also be issued as regards the rapidly-becoming popular slogan: "Vote for the good man, regardless

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87. E.g., Lahr, Ch., *Cours de Philosophie,* Tome II, pp. 249, 250; Ryan, J. A. and Millar, M., *The State and the Church,* p. 271.

88. Cf. St. Thomas, *Summa Theologica,* II-II Q. LXIII; praesertim Art. I c. et Art. II ad 1.

89. As regards the obligation of voting for a worthier candidate, cf. St. Thomas, *Summa Theologica,* II-II Q. LXIII, Art. II ad 3; II-II Q. LXXXV, Art. III c. et ad 3.—Pruemmer, D., *Manuale Theologiae Moralis,* Vol. II, p. 464.

90. St. Thomas, *Summa Theologica,* I Q. LXXXIII, Art. III.

91. Cf. Tanquerey, Ad., *Synopsis Theologiae Moralis et Pastoralis,* Vol. II, pp. 475, 476; Pruemmer, D., *Manuale Theologiae Moralis,* Vol. II, p. 99; Ryan, J. A. and Millar, M., *The State and the Church,* pp. 273, 274.

of his party." Plausible as this may be, still it has its dangers and hidden fallacies. In voting, one cannot and should not ignore "principles" and "policies". The "good man" is not always the one with the best political principles or party to the best political policies. Often the "good man" must be passed up because of his principles and policies. He should be considered always in his entirety and in the necessary connections that he is bound to have with party lines. What will conduce more to the common good, the man or his principles and policies?,—that is the question one should answer before casting his vote.[92]

In conclusion, the fervid appeal of the American Hierarchy in their National Pastoral Letter of 1840 is here subjoined. Among other things regarding "The Sacred Obligation of the Ballot",[93] the then and still timely document counseled: "Beloved brethren, flee this contamination, keep aloof from these crimes—reflect that you are accountable not only to society but to God, for the honest and fearless exercise of your own franchise, that it is a trust confided to you not for your private gain but for the public good, and that if yielding to any undue influence you act either through favor, affection, or the motives of dishonest gain against your own deliberate view of what will promote your country's good, you have violated your trust, you have betrayed your conscience, and you are a renegade to your country."[94]

Part II: The Passive Vote or The Right To Hold Office

Once the basis for the right to vote is established, that for the right to hold office also is. Since, however, the underlying principles of "the vote" have already been laid down, all that remains is that they be properly applied. Moreover, certain prob-

92. On this subject, cf. Ryan, J. A. and Millar, M., *op. cit.*, pp. 272, 273.

93. Guilday, P., *The National Pastorals of the American Hierarchy, 1792-1919*, pp. 142, 143.

94. *Ibid.*, p. 143.

lems, due to the peculiar conditions that actually beset the right to hold office here in the United States, will also have to be solved.

ARTICLE I — THE MORAL FOUNDATION OF THE RIGHT

The same may be said of the moral foundation of the right to hold office, as was said of that of the right to vote. *In principio* or before the establishment of government, each man, in so far as he is man and in so far as all natural and supernatural designation of sovereignty is lacking, has as much right to be designated or elected to office as any one else. True, certain supereminent qualities or perfections may render a particular person more fit and worthy to be designated to office than another. But in so far as others are men and by their perfected state of human nature are capable of promoting the common welfare, they have a natural right to be considered as candidates and to hold office if the majority of the electorate should deem them worthy and competent to do so.[95]

In transmissione or after the establishment of government, the right to hold office, like the right to vote, depends in large measure upon the law of the land, as instituted in the beginning or as subsequently changed and approved. But aside from this *de facto* title to office, what is *de jure* justified? As in the case of the right to vote, a twofold distinction must be made. Considered *per se,* the elective system alone is natural and justifiable, since all men are created equal and in consequence thereof may all equally lay claim to sovereignty. On the other hand, heredity can be but quasi-natural and *per accidens* justifiable, for by nature no one is born a king and may by mere birth-right lay claim to sovereignty. Like the right to vote, the right to hold office (all other things being equal) should be contingent not on a mere physiological act, but rather on the rational choice of an electorate, that designates that this or that particular per-

95. For details, cf. above, "Origin of the Vote *in principio*".

son is most fit or worthy to hold office. Evidently, the fact is not denied that in particular instances the hereditary title to office may have its advantages. This thesis is a thesis of general right and, therefore, with St. Thomas posits only, that the best government *in general* is that in which there is something "ex democratia, id est potestate populi, inquantum ex popularibus possunt eligi principes, et ad populum pertinet electio principum."[96]

ARTICLE II — THE LEGAL FOUNDATION OF THE RIGHT

The legal foundation of the right to hold office is as clearly and firmly established as that of the right to vote. True, the Constitution does not explicitly grant this right, though it surely implies it, if one is to judge from the reasonable and lenient qualifications laid down therein for various office holders. To the better understanding thereof, let us consider the following Constitutional provisions:

First, as to the Presidency, Article II, Section I, Paragraph 5 prescribes: "No person except a natural born citizen, or a citizen of the United States at the time of the adoption of this Constitution,[97] shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States."[98] Such are the three specific Constitutional qualifications for the Presidency. Such also,

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96. St. Thomas, *Summa Theologica,* I-II Q. CV, Art. I—For details, cf. above, "Origin of the Vote *in transmissione*".

97. This clause, it may be remarked, was inserted in deference to such distinguished men of foreign birth as Alexander Hamilton. As over one hundred years have since elapsed, the clause has no longer any significance.

98. Cf. *Constitution of the United States of America, loc. cit.*—Cf. also, e.g., Munro, W., *The Constitution of the United States, A Brief and General Commentary,* pp. 77-78; Burdick, C., *The Law of the American Constitution, Its Origin and Development,* pp. 53-54.

according to Amendment XII,[99] are the qualifications for the Vice-Presidency.

For the office of United States Senator, Article I, Section III, Paragraph 3 stipulates: "No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen."[100] The qualifications for United States Representative, as outlined in Article I, Section II, Paragraph 2, are along the same lines though somewhat more lenient. The Constitution in this regard says: "No person shall be a Representative who shall not have attained the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen."[101]

As can readily be seen, the conditions for election to the United States Senate and House (aside from the variant number of years prescribed) are substantially the same as for the Presidency and the Vice-Presidency. The Constitution stipulates, for all these offices, a certain age, and citizenship and residence in the United States[102] for a given period. Article I, Section VI, Paragraph 2 adds another requirement for United States Senator and United States Representative, namely, that "no person, holding any office under the United States, shall be a member of either House during his continuance in office".[103]

It would stand to reason also, that insurgents and rebels should in some way or other be discriminated against, so that they may

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99. *Constitution of the United States of America, loc. cit.* says: "But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States."—Cf. also, e.g., Munro, W., *op. cit.*, pp. 151, 152; Burdick, C., *op. cit.*, p. 54.

100. Cf. *Constitution of the United States of America, loc. cit.*—cf. also, e.g., Munro, W., *op. cit.*, p. 14; Burdick, C., *op. cit.*, pp. 164, 165.

101. Cf. *Constitution of the United States of America, loc. cit.*—cf. also, e.g., Munro, W., *op. cit.*, p. 7; Burdick, C., *op. cit.*, pp. 159, 160.

102. An added requirement for U.S. Senator and U.S. Representative is residence in the State also.

103. Cf. *Constitution of the United States of America, loc. cit.*—Cf. also, e.g., Munro, W., *op. cit.*, pp. 25, 26; Burdick, C., *op. cit.*, pp. 176-179.

not still further harm the republic. Hence, Amendment XIV, Clause 3 ordains: "No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability."[104]

One more condition as also one more immunity is outlined in Article VI, Clause 3, which says: "The Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound, by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States."[105] In conclusion, it might be remarked that Article I, Section V, Paragraph 1, that makes each House "the judge of the elections, returns, and qualifications of its own members", is an unwise grant of power, since it is too general and, therefore, open to many arbitrary interpretations.[106]

Such are the qualifications that the Federal Constitution exacts of candidates for office. From what was said above with regard to these qualifications, it becomes clear, in the first place, that the right to hold office, aside from certain reasonable conditions to be realized in the aspirant, is a right that all may claim.

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104. Cf. *Constitution of the United States of America, loc. cit.*—Cf. also, e.g., Munro, W., *op. cit.*, pp. 157, 158; Burdick, C., *op. cit.*, pp. 424, 425, 504, 505.

105. Cf. *Constitution of the United States of America, loc. cit.*—Cf. also, e.g., Munro, W., *op. cit.*, pp. 128, 129.

106. Thus, e.g., *America*, 36::18 (February 12, 1927), p. 427 ff.—So, also, e.g., Burdick, C., *op. cit.*, pp. 168, 169.

It is not a right, legally considered, that attaches to this or that person; it is a right of the people at large. Secondly, the above considerations also seemingly substantiate the contention that the right to hold office is natural and sacred, since the qualifications exacted of office-holders are dictated by reason and based on man's common nature. To be of a certain age, to be a resident and a citizen of the country of which one is to be the ruler, are fundamental safeguards that a State must exact in view of the common welfare. To bar insurgents and rebels from offices of trust also is demanded by the common good, while to exact an oath or affirmation to support the fundamental law of the land is a *sine qua non* of stability of government.

The State, as the custodian of the common good, not only may but also must do this. Just as it must acknowledge the right to hold office in the people at large, so also must it keep from office all those who might injure the common welfare. The common welfare is at once the end and the limiting norm of the right. The right exists for the common good and for that alone; when it is subversive or possibly subversive of the common good, it must be suspended or denied exercise. Naturally, as in the case of the right to vote, the State must be reasonable in its demands; beyond that the State is usurping.

In the final analysis, of course, the right to hold office depends on the choice that is made by the electorate or by the person authorized to appoint. These, in turn, must follow their good judgment and conscience in making the choice.

ARTICLE III — SPECIAL PROBLEMS

In conclusion, a word must be said about certain problems with regard to the right to hold office here in the United States. There are three such special problems, namely, The Question of a Religious Test for Office; Campaign Methods and, in particular, Expenses; and finally The Duty to Hold Office.

RELIGIOUS TESTS FOR OFFICE

Much has been written and said concerning religious tests for office here in the United States; considerably more has been pondered and wondered about, — patiently borne. So much so have Catholics in particular been discriminated against especially in regard to the Presidency, that many less instructed people have come to the conclusion that some law or other exists barring Catholics from such an exalted office.[107] In view of this, it may not be without profit to stop here to consider briefly what is *de jure* as well as *de facto* the case, and then to determine what is to be done about it.

As far as the Federal Government is concerned, Article VI, Clause 3 of the Constitution expressly ordains: "...no religious test shall ever be required as a qualification to any office or public trust under the United States."[108] On the other hand, as far as the individual States are concerned, any one, who is familiar with early United States history, will concede the point that religious tests did exist in the original State Constitutions; in point of fact, there were seven States at the beginning of the republic that excluded Catholics from office.[109] However, in the course of time, these Constitutional restrictions were either expurgated or rendered ineffective and inoperative by actual practice, to the extent that it may now be safely asserted "...at the present time there is no law or constitutional provision, State or Federal, which makes religious belief or lack of it, a bar to the holding of an office under the Federal Government, or under any State."[110] Such, then, is *de jure* the status of the religious test for office; that *de facto* it is quite different, the following considerations will demonstrate. Without entering into too many unpleasant details, that do not at all reflect the mind of the bet-

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107. Cf., e.g., *America*, 36::18 (February 12, 1927), p. 419.

108. Cf. *Constitution of the United States of America, loc. cit.*

109. For details, cf. *America*, 7::6 (May 18, 1912), pp. 126 ff.—Cf. also Beard, C., *American Government and Politics*, pp. 460, 464, 495.

110. Cf. *America*, 31::2 (April 26, 1924), p. 31; 39::10 (June 16, 1928), pp. 221, 222.—Cf. also Munro, W., *The Constitution of the United States, A Brief and General Commentary*, p. 129.

ter and more typical class of Americans, it may be frankly said that *de facto* a Catholic has little chance of candidacy and still less of election, at least as far as the Presidency is concerned; with regard to the other inferior offices, the situation is not as hopeless though it is far from ideal.[111] One has only to consider the following facts—a few among many—to sense the general sentiment in this regard. For example, some forty years ago, Richard P. Bland of Missouri was disqualified as Presidential candidate, because his wife was Catholic.[112] Although sentiment has since somewhat subsided, it still runs high. We may take as typical thereof an article that appeared in *The Christian Science Monitor* for July 5, 1924, and that admitted Senator Walsh's sterling character as a gentleman, a scholar, a great public servant, a perfect American and as possessing every other qualification for the Presidency; yet, after such a eulogy, the writer of the said article was of the opinion that the very plan of proposing Senator Walsh as Presidential candidate was an "insidious and menacing movement."[113] Any one familiar with the Democratic Presidential Convention of June and July 1924, and the Presidential Election of November 1928, in which the Honorable Alfred E. Smith was rejected by his party and then by the American people for the only too evident fact of his Catholicism, will blush in admitting that a *de facto* test for Catholics does exist. We can cite, for instance, in this regard, the statement of Bishop Adna W. Leonard, general superintendent of the Methodist Church in Western New York and President of the Anti-Saloon League. In a talk delivered at Round Lake, New York, on August the 8th 1926, the Church dignitary

111. Edward J. Byrne has an excellent article with bibliography on "The Religious Issue in National Politics" in *The Catholic Historical Review*, New Series, Vol. VIII, No. 3 (October 1928), pp. 329-365.—A thought-provoking study on the specific problem of religious tests for public school teachers comes from the pen of J. W. Maguire in *America*, 37::5 (May 14, 1927), pp. 110 ff.; 37::6 (May 21, 1927), pp. 136 ff.

112. Cf. *America*, 31::2 (April 26, 1924), p. 32.

113. Quoted and commented on in *The Catholic World*, New York, August 1924.

said in part: "This is a Protestant country and will ever remain so....The Anglo-Saxons of this country will see that Latin ideals do not obtain, but that the ideals of Christianity shall continue... no Governor, be he nullificationalist or not, can kiss a Papal ring and ever get within gunshot distance of the White House."[114] Such are the sentiments that are expressed and the attitudes that are taken by some with regard to the candidacy and the election of Catholics. The lamentable thing about it all is that the results of such propaganda are simply astounding, that the sentiment is clearly manifested in the actual result of the ballot. Thus, of the thirty-one Presidents of the United States, including Franklin D. Roosevelt, not a single one was Catholic. As for the Church affiliations of Congressmen, the disparity of proportionate representation is almost as great, though there are some Catholics in both Houses. Now, one may ask: Why cite all these facts and advance all these statistics? Is the sole or merely the secondary end of it all a Catholic for the Presidency and a greater Catholic representation in the other offices? No, it is not that;[115] but simply to prove that, although *de jure* no religious test exists, *de facto* one is rigorously enforced in diametric opposition to both the letter and the spirit of the Constitution.[116]

The moral, that should be drawn from all this, is that American ideals and Constitutional provisions have been ruthlessly ignored or at least rudely distorted. When one ignores the smallest of them, the others also are soon ignored and the whole governmental venture is before long undermined. We firmly believe, that in a country, that professes religious liberty, that inserts into its Constitution an express immunity from religious tests for office,—to exclude one person or to elect another solely on grounds of religious belief are equally dangerous assaults on the letter as well as the spirit of American government.

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114. Quoted by *America*, 35::19 (August 21, 1926), p. 438.

115. For the explicit declaration of the Holy See (May 10, 1927) as to its policy of aloofness from the politics of the United States, cf. *America*, 37::6 (May 21, 1927), p. 125.

116. Thus, also, e.g., *America*, 37::4 (May 7, 1927), p. 78.

CAMPAIGN METHODS

Another special problem with regard to the right to hold office is the question of campaign methods. Needless to say, only legitimate methods can be justified. Calumnies, detractions, false pretensions, lies, —in general, faults against charity, justice and the other virtues cannot be tolerated; these means are bad in themselves and cannot be justified by the end no matter how good that might be. Perhaps the most insidious means, as its true nature is not always so apparent, is the corrupt or otherwise unjustified use of money in procuring candidacy or election. Aside from the fact whether the money is used in buying votes or in any other corrupt way, so much money is nowadays needed in the United States to procure candidacy or election, that riches are indispensable to the aspiring candidate for office or his supporters. As illustrative thereof, we have the report on the investigation of the now historical and notorious "millionaire" senatorial primaries in Pennsylvania and Illinois some years ago. If a great deal of wealth is necessary, then no matter how politically virtuous and fit a poor man may be, he has no chance for office; he is by the very fact excluded. Money becomes a *de facto* though by no means a *de jure* qualification for office. What a danger, indeed, this becomes to good government,—a danger, because office then becomes dependent on riches and on those pretended virtues that an expensive campaign alone can intrigue the people into believing as genuine! Now, office, as an ordinary sense of righteousness dictates, should be dependent on true political virtuousness and competency. Such is the thesis of all moralists; such is the thesis of Aristotle and St. Thomas. For instance, in *De Regimine Principum,* the Angelic Doctor advances the thesis of the Stagirite, that, although poverty may have its dangers for the office-holder, still, provided for properly by the State: "Sive ergo pauper, sive dives, dummodo vivat secundum virtutem, assumendus est in vera politia."[117]

117. Cf. St. Thomas, *De Regimine Principum,* Liber IV, Caput XX (Not written by St. Thomas).

THE DUTY TO HOLD OFFICE

The third and final problem special to the right to hold office is the Duty to do so. Duty? Yes, though people nowadays fail to realize this, in their evaluation of office as a right and an honor. However, there cannot be any doubt that at times it is a duty and a burden, that one is not free to accept or refuse, but that one is obliged in conscience to accept. And yet it does not follow, that under all circumstances the duty is incumbent on one to present himself for and to accept candidacy and, subsequently, election or office. In fact, it seems only reasonable that only under certain circumstances is one obliged to do so. These circumstances are: (1) The candidate's election must be certain; (2) His election must be the means of averting grave harm to the community; (3) His election must not entail grave inconvenience; (4) No other candidate equally competent to promote the common good must be available.[118] When these conditions obtain, one is obliged to accept candidacy and, subsequently, office. The principal difficulty here seems to lie in condition three, since too many, as a matter of fact, look upon office-holding as an encroachment upon their personal affairs and preferred occupations. Yet, should such personal inconvenience stand in the way of the *common* good, which is at all times superior to the private? Just as in the case of the vote, only a proportionately grave reason can absolve one from casting his ballot, so also here in the case of office-holding, only a proportionately grave reason can excuse one from accepting candidacy or office. If such a reason is required for abstention from voting, what a still graver reason by far is necessary here where the consequences of the individual's duty are by far more serious[119] and personally imputable!

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118. Cf., e.g., Noldin, H., *De Principiis Theologiae Moralis*, Vol. II, pp. 341, 342, no. 323; Ryan, J. A. and Millar, M., *The State and the Church*, p. 275.

119. Ryan, J. A. and Millar, M., *The State and the Church*, p. 275.

CHAPTER VIII

EPILOGUE

ARTICLE I — IMPLIED RIGHTS

By way of conclusion, a few words remain to be said on implied rights, equal rights and the protection of one's rights. In the preceding chapters, those civic rights and only those have been considered that are explicitly guaranteed in the Constitution. However, it is clear to any one, who reflects, that these alone do not constitute the sum total of all such rights. True, these are among the most important and the most open to attack; still, there is no gainsaying the fact that other rights as equally important and as equally open to attack exist, for instance, such fundamental and sacred rights as the rights to choose an occupation, to contract, to marry, etc. Such rights with all their consequential rights are too numerous even to cite; in fact, they defy enumeration.

It is for this reason that State documents have never attempted to define them explicitly and minutely, while in no way denying them. Thus, *The Declaration of Independence,* after asserting that all men "are endowed by their Creator with certain unalienable rights",[1] declares that "*among these* are Life, Liberty and the pursuit of Happiness".[2] Curt as this enumeration may appear, it contains, in substance, a guarantee for any right that any one as a human being living in the State can lay claim to. Perhaps it was because of the impossibility or the futility of drawing up an exhaustive list of such rights that the exponents of this glorious document resorted to such general and comprehensive terms.

If one examines the *Constitution of the United States of America,* together with its Bill of Rights, he will note the same

1. Cf. *The Declaration of Independence.*
2. Cf. *Ibid.* (The italics are ours).

apparent conviction on the part of its framers. After explicitly enumerating a certain number of rights,[3] they wisely assert in Amendment IX: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."[4] The wording is clear; the framers of the Bill of Rights did not aim at an exhaustive list; in fact, they fully realized that it was not. The same idea is reiterated in the "life, liberty, or property" clause of the Fifth[5] and the Fourteenth[6] Amendments. Under such terms and especially under the term "liberty", any right not explicitly guaranteed could find protection.

If, after examining the Declaration of Independence and the Federal Constitution, one has recourse to the United States Supreme Court Decisions, he will find the same avowal. Since a thorough study of these decisions is entirely out of the question,[7] only the following is cited here as illustrative of the contention. In the famous Nebraska Foreign Language Case of June the 4th 1923, Justice McReynolds said: "While this court *has not attempted to define with exactness the liberty thus guaranteed,*[8] the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally

3. These rights are incorporated in the first eight amendments. The consideration of these rights was the burden of the preceding chapters.

4. Cf. *Constitution of the United States of America*: Amendment Nine; cf. Burdick, C., *The Law of the American Constitution, Its Origin and Development,* p. 437, n. 1.—Cf. also Amendment Ten; and the Preamble, which may be considered as the general norm for these two amendments and for the rest of the Constitution.

5. Cf. *Constitution of the United States of America*: Amendment Five.

6. Cf. *Ibid.*: Amendment Fourteen.

7. The United States Supreme Court Decisions (as was mentioned in the introduction of this work) comprise some 297 volumes (July 1936).

8. The italics are ours.

to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.''[9]

From all this, one gathers that there are many rights, which, although they are not explicitly defined in our State documents, are nevertheless not denied but rather admitted by them. As this dissertation does not deal with such so-called ''implied rights'', the above observations will have to suffice; such was the limited view set in the inception of this work.

ARTICLE II — EQUAL RIGHTS[10]

One hears so much of ''equal rights'' nowadays, that a word or two must be said about them. Lest there be any misunderstanding with regard to the position here taken, be it remarked at the outset that no issue is taken with those who would assure women the more important domestic and economic rights, for such a movement is anything but reprobable. However, there is at the present time a movement on foot that would secure for women an *absolute* equality of rights in the social and economic domains as well as in political affairs. It is this problem that is dealt with here in discussing the question of ''equal rights''. Far from being a merely universal problem at large, this question has been the subject of special and overdue attention in the United States. In fact, the movement has acquired so much assertiveness that it has embodied itself in an amendment proposed to the Federal Constitution. The said amendment provides: ''Men and Women shall have equal rights throughout the United

9. Meyer *v.* State of Nebraska, 262 U.S. 390, 399.

10. The following works, among others, will prove enlightening on this question: Roesler, A., *Die Frauenfrage,* Freiburg im Breisgau, 1907 (2nd edition); translated into French by J. de Rochay, *La Question Féministe,* Paris, 1899—Turgeon, Ch., *Le Féminisme français,* 2 Tomes, Paris, 1907—Sertillanges, D., *Féminisme et Christianisme,* Paris, 1908—Ziegler, Th., *Die soziale Frage eine sittliche Frage;* translated into French from the fourth German edition by Palante, *La Question Sociale est une Question Morale,* Paris, 1911, 4th edition, pp. 107-128—*Semaines Sociales de France* (XIX Session, Nancy, 1927), ''La Femme dans la Société'', Paris, 1927.

States, and in every place subject to its jurisdiction.''[11] Just to what limits such an amendment might be stretched, is hard to divine. It would certainly include ''the rights to choose residence for voting purposes, to perform jury service, to hold office, and to have with men an equal right to the care and custody of children'';[12] in fact, it would include any right that man may lay claim to, for it advocates not merely equality but more properly identity. The root of the difficulty, we believe, lies in that oft-quoted, invaluable yet abused expression in *The Declaration of Independence,* namely, ''all men are created equal... they are endowed by their Creator with certain unalienable Rights''.[13] Thereunder the ''Equal Rights'' exponents take refuge as if in an impregnable fortress of infallibility in all their specious reasoning. But, are they right? Are all men created equal? To any clear-thinking individual it is evident that a distinction must be made, as thereon hinges the entire difficulty. All men are created equal, and then again they are not.[14] But what does that mean? Briefly this: If one considers man's human nature, its substance and the rights and the duties that immediately flow therefrom, if one considers man's soul, the sufficiency of grace proferred to each and the common vocation of all to eternal glory as a reward for virtuous living,— if one considers all this, then one must avow: all men are created equal. All men in so far as they are *men* are equal,—about this there can be no doubt; they all have the same nature, they are all equally men and as such all possess certain initial rights.

However, it is equally clear, that if men are born with the same specific nature and, therefore, the same initial rights, men are also born with a marked variety and inequality of initial gifts. One has but to acknowledge the attestation of his senses. At birth, one observes a difference of sex, an inequality as to a future state of independence and riches, etc. Men, in this sense,

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11. Quoted in *America,* 34::17 (February 6, 1926), pp. 397, 398, ''The Equal Rights Amendment''.

12. *Ibid.,* p. 397.

13. Cf. *The Declaration of Independence.*

14. Le Buffe, F., *Outlines of Pure Jurisprudence,* pp. 121-126.

are positively unequal; there can be no closing of the eyes to this fact; equality as to initial rights flowing from a common nature, inequality as to initial gifts consequent on particular circumstances. Such is the universal law of life.

If one particularizes still more and considers, e.g., the differences due to sex, one notices a marked inequality or rather dissimilarity even in this respect. Women are physiologically, biologically and psychologically different from men.[15] No one can deny such an evident fact of observation. Hence, to argue that women, because they are equal to men, should have equal rights in the sense of identical rights, is fallacious. Valensin says: "C'est un sophisme, car elle n'est pas absolument égale à l'homme; elle a des droits et des devoirs équivalents, non identiques."[16]

If women would achieve this complete emancipation, this absolute leveling so contrary to nature, then it would follow that with equal rights equal duties would be incurred, added responsibility would be imposed. The question is, would not such added responsibility do more harm in the long run than good? One is inclined to think so. The American Hierarchy in their National Pastoral Letter of 1919, while paying a high tribute to woman's "ability to meet the hardest of human conditions", nevertheless sound a note of warning in these words: "Those same qualities [of womanhood] are now to undergo a different sort of trial; for woman by engaging in public affairs, accepts, with equal rights, an equal responsibility. So far as she may purify and elevate our political life, her use of the franchise will prove an advantage; and this will be greater if it involve no loss of the qualities in which woman excels. Such a loss would deprive her of the influence which she wields in the home, and eventually defeat the very purpose for which she has entered the political arena."[17] Such is the danger underlying identical

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15. St. Thomas, *Summa Theologica,* I Q. XCII, "De Productione Mulieris"; cf. *America,* 30::12 (January 5, 1924), pp. 289, 290.

16. Valensin, A., *Traité de droit naturel,* 2 Tomes, Paris, 1922-1925, Tome II, p. 483.

17. Guilday, P., *The National Pastorals of the American Hierarchy,*

rights; woman would thereby be drawn away from her proper sphere, the home, to the detriment of the family and indirectly to that of the State as well. That this is something wrong and, therefore, censured by the moral code is manifest.

What women need are not identical rights, but rather the protection and the privileges, that they peculiarly stand in need of, and that they are actually accorded by law,[18] such as special safeguards as to working conditions, sanitation, hours and wages; as to mothers' pensions, widows' allowances; as to military service; etc. Without these concessions, women would be insufficiently protected, they would be placed at a disadvantage with their consorts. In short, they would be in a state of inequality to men.

Yet, the amendment by advocating equal rights plants the seeds of the very inequality that it strives to eradicate. It attempts to perfect nature's work by making the sexes identical in the eyes of the law, when they are not so in the actual work of the Creator. Such a baseless transformation would be detrimental in the long run to woman and other interests alike. It would be equivalent to amending the Creation,[19] for one reads in "The Book of Genesis": "And the Lord God said: It is not good for man to be alone; let us make him a *help* like unto himself."[20] One remarks also that Adam was created first and that Eve was formed from one of his ribs and intended to be his helpmate. Moreover, if one examines Scripture and Tradition more thoroughly, he will remark also that God in both the Old and the New Testaments excluded women from the priesthood and its sacred functions.[21] It would seem, therefore, that such an absolute leveling of the sexes as to effect identity of rights

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1792-1919, p. 317.

18. Cf. *America*, 35::6 (May 22, 1926), p. 126, "Equal Rights for Men and Women".

19. Cf. *America*, 34::18 (February 13, 1926), p. 417, "Amending Creation".

20. *Bible, The Holy* (Douay Version), Genesis, II, 18 (The italics are ours).

21. Cf., e.g., *Ibid.*, I Corinthians, XIV, 34, 35; I Timothy, II, 11, 12.

would be contrary to the very intention of the Creator.[22] The true Christian ideal, on the other hand, consists in the collaboration of men and women in the great human task of harmoniously uniting the gifts proper to either sex in a common effort towards order, justice and peace.[23] Hence, the earnest exhortation of the great Apostle of the Gentiles: "For as in one body we have many members, but all the members have not the same office: So we being many, are one body in Christ, and every one members one of another. And having different gifts, according to the grace that is given us...."[24] Such must be the Christian's viewpoint of the ways of God; to agitate identical rights is to go contrary to them, to make woman equal contrary to nature by making her unequal contrary to justice.

ARTICLE III — THE PROTECTION OF ONE'S RIGHTS

And now a final word must be said about the protection of one's rights or more particularly about vigilance, that sanest and most effective kind of all protection. "Gouverner, c'est prévoir", the French rightly advise.

REASONS FOR VIGILANCE

But have Americans cause for misgivings? Are their rights really in danger? To one who has thoughtfully read the preceding chapters, it would seem that they are not,—that rights are safe, *as long as* the fundamental law of the land wherein they are guaranteed remains intact and respected. That is true, "as long as...", a condition that is quite precarious to say the least, as the following considerations (aside from those in the preceding chapters) will demonstrate.

The amendment provision in Article V of the Federal Consti-

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22. Pruemmer, D., *Manuale Theologiae Moralis*, Vol. II, p. 457, no. 594, "De emancipatione feminarum"—Cf. also St. Thomas, *Summa Theologica*, I Q. XCII.

23. Valensin, A., *Traité de droit naturel*, Tome II, p. 485.

24. *Bible, The Holy* (Douay Version), Romans, XII, 4 ff.

tution[25] is, in spite of its evident advantages, a source of many, well-founded fears. The twenty-one amendments in no way tell the true story relative to attempted constitutional legislation in the past. We are told[26] that since 1789 no less than 3,500 amendments to the Constitution have been proposed. Now, as long as this craze for amending the American "Magna Charta" obtains, every lover of liberty will have to be constantly on the outlook. That some of these proposed amendments have been and still are positively dangerous to man's most sacred rights was seen to a certain extent in the preceding article. As further illustrative of this contention, we cite the following cases: The Divorce Amendment, proposed some years ago by Senator Capper of Kansas (well-intentioned as he might have been), was and is fraught with many dangers, which only its enactment would bring out in true color.[27]—The proposed Child Labor Amendment (defeated for the time being)[28] was and is again presently the amendment that aroused perhaps the most concern and discussion. Aside from the fact that legislation of this sort would constitute an encroachment on State rights and is otherwise uncalled for, the amendment would be positively harmful and destructive of personal liberty and parental authority. Children under eighteen would become creatures of the State,—deprived of earning the needed dollar by work compatible with their age and condition, forced because of financial reasons to attend a free religionless school, etc. The least reflection can conjure up what an attack on one's most sacred rights, such regulation would effect.[29] Hence, it was with reason that Cardinal O'Connell wrote to his clergy in 1924. "I would rec-

25. Cf. *Constitution of the United States of America*: Article V.

26. Cf. *America*, 35::12 (July 3, 1926), p. 280.—Cf. also Beard, C., *American Government and Politics*, p. 83.

27. Cf. *America*, 34::14 (January 16, 1926), p. 319, "The Divorce Amendment".

28. By the negative vote of the required 13 States (1925).

29. Even in 1924, when the Amendment was first proposed, the States were ably handling the situation; cf., e.g., *America*, 30::7 (December 1, 1923), pp. 170 ff.; 32::10 (December 20, 1924), pp. 238 ff.

ommend that you bring to the attention of your parishioners at all the Masses on Sunday, October the fifth, the dangers hidden in the proposed Child Labor Amendment and the necessity of their registering during the week and their voting on election day *to protect the interests of their children''*.[30] Be it remarked, however, that objection to this amendment does not mean disregard for the rights of childhood, for the tender years and tender bodies of America's children; such a position would be opposed to reason and to the manifest teaching of the Church as well.[31] What is maintained, however, is that child labor must

30. Back in November 1924 (in an article appearing in the current issue of *The Catholic World*), Dr. John A. Ryan treated at length the following six points against the proposed Child Labor Amendment:

(1) It interferes with the family.
(2) It enables Congress to control education.
(3) The eighteen year age limit is too high.
(4) The proposed amendment gives Congress exclusive power over Child Labor.
(5) The regulation of child labor is essentially a local, not a national matter.
(6) The administration of a federal child labor law would be difficult and unduly expensive.

Cf. also *America*, 32::10 (December 20, 1924), p. 239, in which Rev. Jones Corrigan, S.J. gives his ''Ten Reasons for voting 'no' on the child labor amendment''.

After its initial defeat (so to say), the proposed amendment lay dormant until just recently, when interest again flared up. The writer found the following articles rather sound and expressive of his own personal opinion thereon: Blakely, P., ''The Alleged Child Labor Amendment'', *America*, 50::23 (March 10, 1934), pp. 544-546; Wiltbye, J., ''That Child-Labor Amendment'', *America*, 50::24 (March 17, 1934), pp. 568-570; Blakely, P., ''Is There a Child-Labor Amendment?'', *America*, 51::2 (April 21, 1934), pp. 37, 38.

31. Leo XIII in his Encyclical ''Rerum Novarum'', May 15, 1891, says: ''Denique quod facere enitique vir adulta aetate beneque validus potest, id a femina puerove non est aequum postulare. Immo de pueris valde cavendum, ne prius officina capiat, quam corpus, ingenium, animum satis firmaverit aetas. Erumpentes enim in pueritia vires, velut herbescentem viriditatem, agitatio precox elidit: qua ex re omnis est institutio puerilis interitura.''

be reasonably regulated according to due justice[32] and by those closer to the child and more cognizant of particular conditions than a central government is or can be.—Such or similar in nature are some of the 3,500 proposed amendments and their hidden dangers, against which one must be constantly on his guard. Even when defeated for the time being, they remain dangerous by reason of the right of reconsideration that the States have after having previously voted against them.[33] Vigilance, therefore, in this regard, becomes the price of liberty.

This craze or mania for amending is but a manifestation of a larger and more general movement, variously called "Centralization", "Paternalism", "Bureaucracy". In substance, it is a movement that would shift responsibility from local to central government, either voluntarily or coercively. The movement had taken on such proportions, that, until recently (thanks to a much needed reaction)[34], the very character of the dual form of United States government was threatened. When local government waives its rights, then "the greatest contributing factor to the stability, strength, *liberty*[35] and progress of the Nation"[36] is lost with it. Yet, many entertain the foolish idea and vain hope that, as soon as local government proves in the least way incompetent, Washington should step in and regulate. As a

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32. Pruemmer, D., *Manuale Theologiae Moralis*,Vol. II, p. 255 no. 307: "Feliciter in compluribus civitatibus exsistunt leges saluberrimae limitantes laborem mulierum et puerorum, sicut etiam generatim tempus et modum laboris. Nonnullae autem istarum legum sunt incongruae."

33. States, previously ratifying them, do not enjoy this right. Cf. Munro, W., *The Constitution of the United States, A Brief and General Commentary*, pp. 124-126, in particular p. 125; Burdick, C., *The Law of the American Constitution, Its Origin and Development*, pp. 34-50, in particular pp. 43-44.

34. Cf., e.g., *America*, 33::9 (June 13, 1925), pp. 208, 209; 37::10 (June 18, 1927), p. 222; 37::11 (June 25, 1927), p. 247; etc.; and current (1936) literature of all sorts.

35. The italics are ours.

36. Extract from Pres. Coolidge's message in the second day's session of the 69th Congress, December 8, 1925; cf. *Congressional Record*, Vol. 67, Part I, p. 457.

matter of fact, such a policy is not only uncalled for, but also results in: an extravagant waste of money, a less satisfactory solution of local problems, a jamming of more needed Federal legislation, and finally a gradual change of government from a democracy to a democratic sham of monarchy.[37] Even before the advent of the "New Deal", Calvin Coolidge sounded a note of warning, when he declared among other things relative to Federal usurpation: "....Local self-government is one of our most precious possessions. It is the greatest contributing factor to the stability, strength, liberty and progress of the Nation.... Society is in much more danger from encumbering the National Government beyond its wisdom to comprehend, or its ability to administer, than from leaving the local communities to bear their own burdens and remedy their own evils....The wiser policy is to leave the localities as far as we can, possessed of their own sources of revenue and charged with their own obligations".[38]

While much of our present-day New Deal "centralization" and "bureacracy" can be more or less justified, the same cannot be said of the now historic Eighteenth Amendment and the Volstead Act. Granted that the Eighteenth Amendment was a part of the Constitution, still its interpretation by the "appropriate legislation" provided for therein was but another example of how any part of the Constitution may be interpreted and enforced to the detriment of the rest.[39] Thus, it is a fact now

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37. Cf., e.g., *America,* 33::9 (June 13, 1925), pp. 208, 209; 34::11 (December 26, 1925), pp. 255, 256; 34::24 (March 27, 1926), pp. 560, 561; 36::14 (January 15, 1927), pp. 334, 335; 36::15 (January 22, 1927), pp. 358, 359; 36::24 (March 26, 1927), p. 563; 37::16 (July 30, 1927), pp. 372, 373; etc.

38. Extract from the speech referred to in Footnote 36; cf. *op. cit.*, pp. 457-458.

39. Cf. *America,* 34::19 (February 20, 1926), p. 441, for her reasons for condemning prohibition. For still other abuses, on which Prohibition stood further condemned, cf. *America,* 36::14 (January 15, 1927), pp. 323, 324; 36::17 (February 5, 1927), p. 397; 37::7 (May 28, 1927), p. 145; 37::8 (June 4, 1927), p. 175; 37::12 (July 2, 1927), pp. 280, 281; 37::17 (August 6, 1927), pp. 394, 395, 396; 39::8 (June 2, 1928), pp. 185, 186; 39::13 (July 7, 1928), p. 295.

known to all, that, on the altar of the Eighteenth Amendment and Volsteadism, man's dearest rights, guaranteed in the 1st, 4th, 5th, 6th, 9th and 10th[40] amendments, had to be sacrificed. "There is no God but the true God; and Mohammed is his prophet" became for the Volsteader "There is no amendment but the 18th; and the Volstead Act is its unaccountable interpreter". How such things could ever have come to pass in this land of freedom, is beyond most people to explain. If a right, otherwise guaranteed by the Constitution, stood in the way of Volsteadism, that right had to go. How this actually took place relative to some of man's dearest rights, was seen in the preceding chapters. What is singled out here is the threat that Volsteadism was to man's most sacred right, namely, the right of religious liberty. Despite the late Mr. Wayne Wheeler's[41] assurance that the use of wine for sacramental purposes was a constitutional right and not a concession of the Volstead Act, still many had their misgivings. If one is to judge from the restrictions that the law placed on such use, Mr. Wm. B. Guthrie, Professor of Constitutional Law, was more right in saying: "Every American Catholic should now understand that because of the 18th Amendment Congress has the power by law to ban the Holy Sacrifice of the Mass."[42] Such a statement would have called for a challenge, if people had not realized to what limits the Constitutional words "for beverage purposes" had already been stretched. How therapeutic agents, chemicals, sacramental matter could have come under the term "beverage" would have been hard to understand; yet undoubtedly, one would have been told with an air of learning that they did not strictly speaking, but to prevent their misuse as beverages they had to be so regulated. Hence, the restrictions that were actually placed upon them. Aside from the fact whether these restrictions on the sacramental (not to mention also commercial and medical)[43]

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40. Cf., e.g., *America*, 30::18 (February 16, 1924), pp. 436, 437.

41. Counsel of the Anti-Saloon League (Cf. *America*, 34::12, pp. 272, 273 for January 2, 1926).

42. Cf. *America*, 32::18 (February 21, 1920), pp. 398, 399.

43. For unjustified restrictions relative to medical use, cf. *America*, 36::15

use of wine were liberal enough or not, it was clear that if at any time the zealots of Volsteadism would have deemed sacramental wines detrimental to prohibition enforcement, they would have prohibited these also. One would then have pleaded his religion in vain, for if other rights equally guaranteed had been pushed aside in its enforcement, religious liberty also would have been. The repeal of the 18th Amendment, then, did not come too soon.[44] Vigilance, as in the case of the proposed amendments, was again the price of liberty.

Still another motive is given for vigilance. To any one it is clear that behind this entire movement for centralization and the proposed or the actual legislation that it engenders, behind all State and municipal legislation, in short behind anything that *might* do violence in any way to man's rights, lie the interests of various more or less organized parties, bent on pet ideas either through erroneous, personal conviction or through hatred for others. In some form or other, some such organizations have ever and everywhere existed. Every country and every age had and has them, the United States being no exception.[45] They are outgrowths of human nature, some sincere, others manifestly malicious. Such interests are all the more insidious, as they are not only the heart and soul of all actual or proposed legislation, but also the formers of public opinion. False ideas are thus disseminated and given credence, and rancor is thus often engendered. Some work in the day, others like the moth in the night. No matter what be their character, vigilance must be alert and constant; no matter what be the subject of their attack, whether it directly affect one or not, a discountenance of their underlying principles must be made. Such organizations prove

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(January 22, 1927), p. 348; 37::7 (May 28, 1927), pp. 149, 150; 37::14 (July 16, 1927), p. 319.

44. For the true Christian attitude to be taken in regard to the Liquor Question, cf., e.g., *America*, 36::6 (November 20, 1926), p. 126.

45. Cf., e.g., Husslein, J., *God and Caesar*, New York, 1927; *America*, 38::5 (November 12, 1927), p. 101, "Cycles of Bigotry".—As we go to press, we have the investigation of a new form of organized bigotry, namely, The Black Legion.

detrimental not merely to this or that one's interests, but to the whole community at large. What the Hon. Alfred E. Smith said about the Klan, can be asserted equally well of other similar organizations; he declared: "As for the Klan,[46] the Catholic can stand it. The Jew can stand it. So can the Negro. But *the American Government cannot stand it.*"[47] When the American Government is destroyed, then the protection of rights is destroyed also and vice versa. Vigilance, again, is the watchword.

VIGILANCE Such, then, summarily are some of the motives one has for being vigilant. Their gravity and far reaching scope furnish the least reflecting person with food for serious thought. How any one can remain lethargic is, indeed, difficult to understand. The most sacred rights are attacked or at least in danger of assault, yet men remain unmoved. Rightly does F. A. Fullhardt say of us in an article felicitously entitled "Fourth of July Musings"[48]: "This youthful nation has already developed a senile attitude toward the protection of its rights." To be frank, one must admit that he is right, for the majority of Americans are content to sit back in their easy-chairs and peacefully watch their dearest rights disappear. Adverse propaganda perhaps peeves them but does not stir them, adverse legislation surprises them but does not worry them. The one, they are content to think, will pass with time, the other will fall under the axe of a benign Supreme Court. That such an attitude cannot be justified in the face of the actual or the proposed injuries to the rights of man, was clearly shown in the preceding pages. Either, then, Americans will have to bestir themselves, or see one after another of their most sacred rights pass away.

If they choose the first alternative, as that only they can, then

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46. Cf., e.g., Chandler, W., *Against the Ku-Klux-Klan for Religious Liberty*, Washington, 1923; Hawes, H., *Lawless Liberty Becomes Tyranny—The K.K.K.*, Washington, 1924.

47. From a speech given at Boston in 1924; cf. *New York Times*, October, 8, 1924, 1:6.

48. In *America*, 30::12 (July 3, 1926), pp. 280 ff.

it may be asked: Well, what can be done about it? To us it seems, there are two fields of amicable action open to them, one that only remotely affects legislation, another that rather directly influences it. The first may be called Forming Public Opinion; the other, Supervising and Controlling Legislation.

Public opinion is one of the biggest factors in a democracy; its influence is simply enormous.[49] Now, it is evident, in order to form public opinion, one must have formed his own and been thoroughly convinced thereof; for without this personal knowledge and conviction, one cannot hope to form the opinion of others. That is taken for granted, therefore, in discussing the question in hand. To form public opinion, the chief factor is undoubtedly instruction. The majority of people advocate this or that doctrine, not ordinarily out of malice, but more generally out of ignorance. At least that is the case with Americans, a people the majority of whom are fair-minded, it is true, but nevertheless on certain questions wrongly or little instructed. To form their opinion aright calls for a vast program of instruction, the combating of error and the expounding of truth. Nor should this program of instruction be in any way circumscribed; every legitimate means at one's command should be mustered. The poster, the newspaper, the radio, the stage, the rostrum, the church, the school, the workshop, the family circle, the street,—all should be used.[50] Not only a prolonged discourse or a fiery debate, but even a passing word or simple gesture perhaps will impress on others the veracity and sincerity of the "cause". People must hear it at all times and in all places, it must permeate their very system, it must unconsciously affect their mentality,—in short, it must form or mold their opinion. However, in this program of instruction, he, who would form public opinion, must be at all times sincere and fair-minded,

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49. Taft, W., *Popular Government*, pp. 99-102; Butler, N., *True and False Democracy*, New York, 1907, pp. 41-77.

50. For what might be done in this regard, cf. *America*, 34::11 (December 26, 1925), pp. 251 ff., "Campaigning Against Intolerance in Texas"; 37::24 (September 24, 1927), pp. 560 ff., "Educating the Public in Oregon".

free from all rancor and bitterness, for he cannot expect to convince a person whose disfavor he incurs. He must, moreover, bear in mind that no one, after all, likes to be forced to change his opinion; no one, however, objects to changing it himself; in short, pride is bound to obtrude itself. Hence, it would seem, if one can forcibly and clearly inculcate the premises, he does better then to let people draw their own conclusions, than to draw them for them. He ought so clearly to reason a thing out that only one conclusion is possible, but he ought not dare to enunciate it. Therein lies the secret to success against the enemies of self-conceit that one encounters.—To instruction might be added other factors as well; yet all, in the final analysis, could be reduced in some way or other to instruction or to those accessories of instruction that grapple and convince.[51] In this campaign, every one can and must help, some more than others but all nevertheless. Let those whose rights are endangered or attacked put their case before the public at all times and in all places; for the public is fair-minded and will listen if not at once, at least after awhile, if the "cause" is worthy and rightly put.[52]

Such a campaign to form public opinion aright, naturally leads to the consideration of the second pacific means at one's command to protect rights, namely, The Supervision and Control of Legislation. If public opinion is formed aright, one has little to fear from adverse legislation, for the voter will then vote for wholesome laws or for persons who will procure them for him. Once a person is convinced, he will vote accordingly. Thus and thus only can legislation be effectively controlled.

But supposing that this does not prove effective, one can still "supervise" legislation. That this can be done, is proved by the excellent work already accomplished in this regard by the N. C. W. C. A special department of this organization concerns itself with presenting Catholic claims at the nation's capital; it has repeatedly availed itself of the opportunity of appearing at com-

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51. E.g., personal influence over individuals or parties.

52. For an excellent treatise on forming political opinion, cf. *L'Ami du Clergé*, Tome XXV, pp. 818 ss.; cf. also Butler, N., "Education of Public Opinion" in *True and False Democracy.*

mittee hearings and of there expressing its views before final action by Congress. The fact that such little adverse legislation passed within recent years, speaks well for the effectiveness of this service. Similar institutions undoubtedly exist,[53] others can be formed. That is what is meant by "supervising" legislation, which is merely a part, it is true, in the larger scheme for the amicable protection of one's rights.

The policy on Forming Opinion and on Supervising and Controlling Legislation, as outlined above, is at most sketchy. In fact, just a mere outline of the possible modes of action was set forth—modes of action which must still be ingeniously worked out and heartily endorsed by every loyal American,—for as soon as Americans grow indifferent in the protection of their rights, the American governmental venture must needs prove a failure. To every American, therefore, it is said: Protect your rights, your dearest interests demand it, your country will fail without it.[54]

CONCLUSION In conclusion, a conviction is here reiterated—a conviction which has so to say permeated this entire work, namely, that here again as in all other civic difficulties, religion furnishes an easy and unfailing solution. Once religion is put back in American homes and schools, the problem of the protection of one's rights will disappear. As former President Coolidge said some years ago: "We can help to restrain the vicious and furnish a fair degree of security and protection by legislation and police control. But the real reforms which society is seeking will come as a result of our religious convictions or they will not come at all."[55] What America needs, then, is religion. Without religion, legislation and police control are of little avail in instilling a sense of responsibility,

53. E.g., "The Thomas Jefferson League" (Cf. *America*, 34::18, p. 411 for February 13, 1926); "Sentinels of the Republic" (Cf. *America*, 36::14, p. 336 for January 15, 1927); or what of our present-day "American Liberty League"?

54. Cf. *America*, 36::12 (January 1, 1927), pp. 275 ff.

55. Quoted in *America*, 32::2 (October 25, 1924), p. 39.

a respect for authority, a considerateness for the rights of others. Moreover, we add, that without religion in the schools and in the homes as well as in the churches, true religious convictions can never be formed. Hence, the constant and unswerving practice of the Catholic Church in this regard. Catholics, indeed, have been criticized for having their own schools. They have been called un-American because of this. Why? Because they insist on keeping in their schools those essentials that the founder of the American republic considered as the indispensable props of popular government, namely, religion and morality,—those essentials which the early colonists insisted on making an integral part of their pioneer schools. The philosophy of government, then, herein proposed, would seem to be not only right but also genuinely and superbly American. Hence, it is with the sincerity of conviction that we again propose as the panacea for political troubles and as the bulwark of rights, the principle enunciated by the American Hierarchy in their National Pastoral Letter of 1919. They then asserted: "An education that unites intellectual, moral and religious elements, is the best training for citizenship. It inculcates a sense of responsibility, a respect for authority and a considerateness for the rights of others, which are the necessary foundations of civic virtue—more necessary where, as in a democracy, the citizen, enjoying a larger freedom, has a greater obligation to govern himself."[56] Or, as Cardinal O'Connell of Boston once said: "Wherever religion has been held in honor and the laws of God permitted to prevail, there the rights of men have been respected and the functions of the State restricted within their proper bounds."

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56. Guilday, P., *The National Pastorals of the American Hierarchy, 1792-1919*, p. 335.

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ERRATA

Page 4, footnote 11	-	For Collección, read Colección.
" 8, line 26	- -	" respect to, read to respect.
" 9, line 14	- -	" omited, read omitted.
" 12, footnote 46	-	" *Saemmtlicke*, read *Saemmtliche*.
" 18, footnote 68	-	" call, read calls.
" 59, footnote 117		" unguam, read umquam.
" 89, line 12	- -	" one, read on.
" 253, Brueck	-	" 4, read 2.